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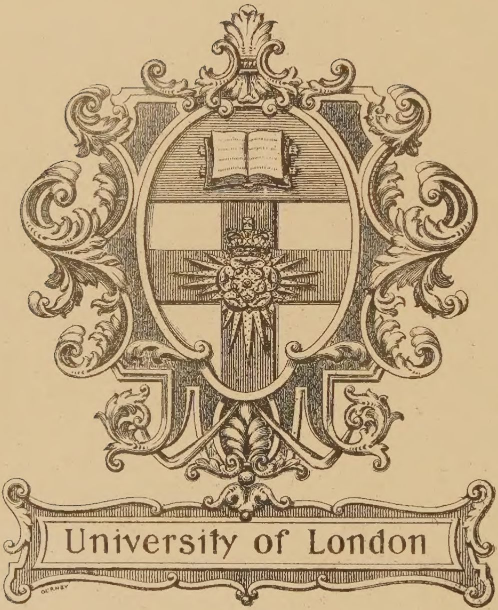
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AND BY THE
CHIEF JUDGE IN BANKRUPTCY
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE CHANCERY DIVISION AND THE
CHIEF JUDGE
AND IN
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234	2 of head-note		or	and
243	— 2		*Romer*	*Boome*
260		*add*	MINUTES :—Declare Plaintiff entitled for her separate use to the £105 2*s.* 11*d.* and £300 bonds.	
896	— 11	*after*	"consisted of" *insert* "a Mr. *W. F. Bradbury.*"	
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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

BEST *v.* HAMAND.

[1877 B. 371.]

C. A.
1878
V.-C. H.
May 29;
June 18.
C. A.
1879
April 7.

Vendor and Purchaser—Conditions of Sale—Superfluous Land of Railway Company—Option of Prior Owners—Lands Clauses Act, 1845, s. 128—*Condition that Purchaser shall admit a Defective Title—Forfeiture of Deposit.*

A contract for sale of superfluous land of a railway company which had been conveyed by the company to the vendor contained a stipulation that the purchaser should assume and admit that everything (if anything was necessary) was done by the company to enable them to sell the land as surplus land, and should not call for or require production of any evidence to that effect; and a further stipulation that if the purchasers should fail to comply with the terms of the agreement the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; and as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit and damages. The vendor then sold the land to one of the prior owners:—

Held (reversing the decision of *Hall*, V.C.), that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor; and that as he had refused to abide by that stipulation he had broken the contract, and could not maintain the action, or claim a return of his deposit.

13 Ch D 150
8 QBD 44

ON the 23rd of March, 1877, the Plaintiffs, *John Best* and others, entered into a written agreement with the Defendant *A. P. Hamand* for the purchase of two pieces of freehold land at *Harborne*, in the county of *Stafford*, for £2025, and the Plaintiffs paid £200 as a deposit on the said purchase.

The two pieces of land formed part of certain lands conveyed in March, 1873, to the *Harborne Railway Company* for the purposes of their undertaking, under the powers of their Act, and not being required by them, were sold in February, 1877, as superfluous lands to the Defendant.

The agreement of the 23rd of March, 1877, referred to a plan annexed thereto, which was headed "*Harborne Railway*, Surplus Land." The agreement provided for payment of a deposit, and contained the following stipulations:—

"Inasmuch as the said pieces of land form part of other land conveyed to the *Harborne Railway Company* by an indenture of conveyance dated the 22nd March, 1873, the title shall commence with that conveyance, and the purchasers shall not be entitled to call for or investigate or make any requisition or objection in respect of any prior title, notwithstanding that such prior title shall appear by recital, statement, or otherwise, or shall not appear at all, or to call for or require evidence of any of the recitals or statements contained in the said conveyance, and shall also assume and admit that everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the said pieces of land as surplus lands, and shall not call for or require production of any evidence to this effect, or of the identity of the land with that described in the conveyance."

"If the purchasers shall insist on any objections or requisitions as to title or abstract, or evidence of title, conveyance, or otherwise which the vendor shall be unable or unwilling to remove or comply with, the vendor may, by notice in writing to be given to the purchasers or their solicitors at any time and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, and shall thereupon return to the purchasers their deposit, but without any interest, costs of investigating the title, or other compensation or payment."

"If the purchasers shall fail to comply with the terms of this agreement the deposit shall thereupon be forfeited to the vendor."

On perusal of the abstract of title furnished by the vendor, and on receiving his replies to these requisitions, the Plaintiffs discovered that no offer had been made by the company to the original or adjoining owners, as required by the 128th section of the *Lands Clauses Act*, 1845; and from inquiries made of other persons, the Plaintiffs ascertained that Miss *Price* and Mr. *W. R. Holden*, two of the adjoining owners, had not waived their right of pre-emption.

On the 23rd of May, 1877, the Plaintiffs gave notice that unless the defects in the title were cleared within fourteen days, they should retire from the contract and require their deposit to be returned.

On the 24th of May the Defendant replied by declaring that, as the contract was not to be carried out, the deposit would be forfeited.

On the 18th of July the Plaintiffs brought the present action against the Defendant, in which they claimed repayment of the deposit of £200, damages for the breach of contract, and consequential relief.

The Defendant put in a statement of defence relying upon the terms of the contract.

On the 25th of January, 1878, the Defendant gave notice to the Plaintiffs that he rescinded the contract under the clause for that purpose contained in the contract, and offered to return the deposit, but the Plaintiffs refused to accept the deposit without also being paid the expenses consequent on the contract and the costs of the action. However the Defendant, considering that the contract was at an end, sold the pieces of land in question to Mr. *Holden* for the same price as the Plaintiffs had agreed to pay, and the property was conveyed to him.

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The action came on for trial before Vice-Chancellor *Hall* on the 29th of May, 1878.

Dickinson, Q.C., and *W. Barber*, for the Plaintiffs, contended that, having discovered the defect in the title *aliunde*, the Plaintiffs were fully entitled to take the objection notwithstanding the clause in the contract on which the Defendant relied.

Nalder (*W. Pearson*, Q.C., with him), for the Defendant, contended, first, that the Plaintiffs were precluded by the terms of the contract from taking this objection, and bound to accept such title as the Defendant could give; and on this point they addressed the same arguments to the Court which they afterwards urged before the Court of Appeal. Secondly, they insisted that the land in question was "situate within a town," or "built upon or used for building purposes," within the exception from the 128th section of the *Lands Clauses Consolidation Act*, 1845, and therefore that the company were not obliged to offer it to the original or adjacent owners; and on this point they referred to *City of Glasgow Union Railway Company* v. *Caledonian Railway Company* (1); *May* v. *Great Western Railway Company* (2); *London and South Western Railway Company* v. *Blackmore* (3); *Coventry* v. *London, Brighton, and South Coast Railway Company* (4); and distinguished *Carrington* v. *Wycombe Railway Company* (5) and *Hooper* v. *Bourne* (6). Thirdly, they contended that under the circumstances the Defendant had the right to forfeit and retain the deposit, or rescind the contract, at his own option.

HALL, V.C.:—

It appears to me that the Plaintiffs are entitled to my judgment in this case. The first defence is that the Plaintiffs are precluded by the terms of the contract from taking the objection which they have made to the title; but I think that a purchaser becoming acquainted with such an objection to title as the present is entitled to insist upon it notwithstanding such a condition as this.

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(1) Law Rep. 2 H. L., Sc. 160.
(2) Ibid. 8 Q. B. 26, 29.
(3) Ibid. 4 H. L. 610.
(4) Law Rep. 5 Eq. 104.
(5) Ibid. 2 Eq. 825.
(6) 3 Q. B. D. 258.

Upon this point the only authority I shall refer to is the decision of Vice-Chancellor *Malins* in *Harnett* v. *Baker* (1), in which he reviews the cases of *Spratt* v. *Jeffery* (2), *Shepherd* v. *Keatley* (3), and *Warren* v. *Richardson* (4); and to a case before Vice-Chancellor *Wood*, of *Darlington* v. *Hamilton* (5). The question here arises, it is to be observed, not upon any stipulation in the contract as to the commencement of title, or as to anything which is to be investigated or objected to in respect of prior title, but upon that part of the condition which provides that the purchaser shall "assume and admit that everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the said pieces of land as surplus lands, and shall not call for or require production of any evidence to this effect or of the identity." Now, as to that particular stipulation, this is a case in which specific performance of the contract is, of course, entirely out of the question.

Where conditions of this nature came into question in the authorities which have been referred to in the arguments, the case has been one of specific performance or nothing. Here, from the circumstances of the case, specific performance is impossible. The thing is gone; the property is no longer capable of being taken or acquired by the purchasers, and the vendor is not in a situation to give it. Somebody else has set up a claim to it, and by reason of that claim having been put forward, arrangements have been made under which the vendor is not in a condition to convey to the Plaintiffs. The Plaintiffs are here seeking to have their deposit returned, with the costs, charges, and expenses which they have been put to as purchasers. It is not now disputed that the purchasers are entitled to the deposit, although at one time the vendor claimed that as having been forfeited under the contract. That now is not really in question, and the whole matter in dispute in this action is the costs of the action, and also, I may add, certain costs which are not properly costs of the action, namely, the costs to which the purchasers have been put by investigating the title.

(1) Law Rep. 20 Eq. 50.

(2) 10 B. & C. 249.

(3) 1 C. M. & R. 117.

(4) You. 1.

(5) Kay, 550, 558.

Then the next defence which has been taken is this, that the land is in "a town," or that it is building land. I shall not go through the cases which have been cited on that point in the course of the argument, but applying the oral evidence and the evidence of the plan to the existing state of things, it appears to me the result is that that defence fails, and that this is not land within the town, or building land within the meaning of the 128th section of the *Lands Clauses Act*.

The third defence is that the Defendant has a right to forfeit the deposit, or rescind at his option, and that he has rescinded by the letter of the 24th of May, 1877, or, if not then, since that time. I hold, however, that the Defendant was not, under the circumstances, entitled to forfeit the deposit, for I think that the Plaintiffs were not in default; and as to rescinding, I hold the condition was not acted on till long after the action was brought, and then not under circumstances on which it could be acted on. In coming to this conclusion, I do not overlook that the condition contains the words "notwithstanding litigation." Having regard to the claim which the Defendant had improperly made to retain the deposit, the Plaintiffs are, I think, entitled not merely to the deposit but to the costs of the action, and I think the condition as to rescinding should not be held applicable in the Defendant's favour in depriving the Plaintiffs of the costs.

Therefore the Plaintiffs will have judgment for £200 and the costs of the action, together with their costs and expenses of and consequent on the contract not being carried out.

I may say, with reference to the only other point which I have not mentioned before, because it was disposed of in the course of the discussion, namely, whether this is superfluous land or not within the meaning of the Act, that I consider the case to be concluded so far as this Court is concerned, and also, I should apprehend, so far as the Court of Appeal is concerned, by the authorities referred to and by the decision in *Hooper* v. *Bourne* (1). Whatever weight might be due to Mr. *Nalder's* criticisms upon that case, and to his reference to the earlier authorities, I consider that it is not open to me to go into or investigate them; but I am prepared to say that, so far from it appearing to me that the

(1) 3 Q. B. D. 258.

judgments are open to observation, and are not reconcilable with the other authorities, it appears to me that they are not only reconcilable, but that they are founded on good sense; and if I had to decide with the advantage of having the reasoning of the Lords Justices before me, whether in the shape of argument of counsel or otherwise, they would have persuaded me certainly in the same way.

C. A.

From this judgment the Defendant appealed. The appeal was heard on the 7th of April, 1879.

W. Pearson, Q.C., and *Nalder*, for the Appellant:—

We do not dispute the finding of the Vice-Chancellor that the land was not situate in a town or used for building purposes.

We rest our defence on three grounds: First. By the express terms of the contract the purchasers are precluded from making the objection which they have made to the title; secondly, even if the objection might be made it has no validity; and thirdly, the Defendant has properly rescinded the contract under a clause in the agreement, and therefore no action can be brought for the breach of it.

As to the first point, there is a distinction between conditions of sale by which the purchaser is simply prevented from putting the vendor to prove particular things; in which case he is at liberty to prove them himself *aliunde*, and the stricter form of condition in which the purchaser is bound to take certain facts as true, or a certain title as good, whatever evidence he may discover to the contrary. The present contract comes within the latter description. The purchaser is not only not to call for any evidence on the subject referred to, but he is "to admit and assume that everything necessary has been done." He is, in fact, to take such title, so far as regards that point, as the vendor has. Such a condition is not uncommon, and has been supported by numerous decisions: *Wilmot* v. *Wilkinson* (1); *Spratt* v. *Jeffery* (2); *Freme* v. *Wright* (3); *Duke* v. *Barnett* (4); *Hume* v. *Bentley* (5); *Hume* v. *Pocock* (6); *Darlington* v. *Hamilton* (7); *Nunn* v. *Hancock* (8).

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(1) 6 B. & C. 506.
(2) 10 B. & C. 249.
(3) 4 Madd. 364.
(4) 2 Coll. 337.
(5) 5 De G. & Sm. 520.
(6) Law Rep. 1 Ch. 379.
(7) Kay, 550, 558.
(8) Law Rep. 6 Ch. 850.

In the present case there is nothing misleading in the stipulation, and the purchasers had full notice on the face of the contract that the land was surplus land of the railway, and they were bound to know the legal incidents of such land. They entered into the contract with their eyes open, and probably took the doubt resting on the title in the calculation of the purchase-money. This is an action for damages for breach of the contract by the Defendant, and considerations which might apply to actions for specific performance by the vendor do not apply. It is a simple question of the meaning of the contract. On these grounds we contend that the action ought to be altogether dismissed.

[They were stopped as to the other points, the Court desiring to hear the counsel for the Plaintiffs on the first point.]

Dickinson, Q.C., and *W. Barber*, for the Plaintiffs:—

The stipulation in question does not preclude the purchaser from objecting to the flaw in the title of the vendor if he has ascertained it *aliunde*. The words "to admit and assume that everything necessary has been done" only mean that the purchasers are not to require the vendor to prove it. The contrary construction would enable the vendor to commit a fraud, because he knew that no offer had been made to the persons entitled to an offer under the *Lands Clauses Act*, whereas the purchasers could know nothing about it: *Darlington* v. *Hamilton* (1); *Shepherd* v. *Keatley* (2); *Waddell* v. *Wolfe* (3).

[BRAMWELL, L.J.:—Do you now decline to admit that everything necessary has been done? If so, you are breaking the contract; and how can you maintain an action against the Defendant for breaking it in the same matter?]

We certainly allege that everything has not been done, but we do not call upon the Defendant to prove the contrary. The clause must be construed with reference to the whole contract. The vendor contracted to give us the land, not to give us a conveyance which passed nothing. We have shewn that he could not give us the land; therefore he has broken the contract, and we are entitled to damages. The Defendant could not have maintained an action for specific performance against us. He has put it out of his own

(1) Kay, 550. (2) 1 C. M. & R. 117. (3) Law Rep. 9 Q. B. 515.

power to perform the contract, for he has sold the land to one of the adjoining owners. At all events we are entitled to a return of the deposit, as the contract has come to an end through the Defendant's fault and not through ours.

James, L.J.:—

It was very properly admitted by both sides that the real question in this case is the true meaning of the stipulation in the contract. If it has the meaning attributed to it by the Appellant it falls within one class of authorities; if it has the meaning attributed to it by the Respondents it falls within the other class of authorities. The agreement gives distinct notice to the purchaser of the nature of the property, namely, that it is superfluous land of a railway company. [His Lordship then read the stipulation set forth above, and continued:—] Now the argument of the Respondents is that all those words, "and shall assume and admit that everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the said pieces of land as surplus lands," are immaterial and surplusage, and that the whole effect of the clause is comprised in the subsequent words, "and shall not call for or require production of any evidence to this effect." If so, what could have been the meaning of this clause? It is not unreasonable for a vendor to say to an intended purchaser, "You know all the law about surplus lands of a railway, but I am not going to have any question raised about this piece of land. Therefore you must admit that if anything was necessary to be done under the *Lands Clauses Act*, everything has been done." If the purchaser then agrees to admit that, he must admit for all purposes and upon all occasions that everything was done by the company necessary to enable them to sell and convey the land to a purchaser; and if he does not admit that, he has broken the contract, and cannot complain that the Defendant has broken it. He entered into the contract with his eyes open, and is not now entitled to be released from it.

But it is said that the vendor could not perform his part of the contract by conveying the property. That is a mere fallacy. At the time when the purchasers refused to complete because they

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had not accepted the title, there could have been a legal conveyance of the property, as there could be a conveyance in any other case. The vendor had seisin and possession of the land. There may have been a doubt on the title not removed, but it would have been not the less a conveyance of the property because there was a doubt on the title. If otherwise, there could be no valid conveyance of an estate while there was any outstanding interest. But we know that it seldom happens that estates are sold without some such reservation on the title. A condition like that in the present case is the technical method which enables owners to convey property although there is some doubt on the title. It is true that there may be cases in which the Court will refuse to enforce specific performance against a purchaser because the title is a doubtful one, but that question does not arise here. I am of opinion that the Vice-Chancellor's judgment must be reversed, and the action dismissed with costs.

BAGGALLAY, L.J.:—

I am of the same opinion. A series of decisions have established the distinction between cases in which the vendor is not to be bound to produce evidence of a fact, and cases in which the fact is to be accepted without question. In *Hume* v. *Bentley* (1) Vice-Chancellor *Parker* considered all the authorities on the subject; and in *Waddell* v. *Wolfe* (2) all the Judges referred to that case as shewing that this distinction is to be observed. Therefore the question is, within which of the two classes of cases the present action falls. First, the purchaser has full notice given him that the land to be sold is surplus land of a railway company. Then the contract contains a stipulation that the purchaser is to require no earlier title than the conveyance to the company; and then it goes on to provide that the right of the company to sell the lands shall not be inquired into. That is the sense, as I take it, of the clause in question in this action. The words are, the purchaser "shall assume and admit that everything (if anything were necessary) was done and performed." I can hardly conceive any words bringing the case more clearly within the second class of authorities. If so, the purchaser has been insisting upon

(1) 5 De G. & Sm. 520.

(2) Law Rep. 9 Q. B. 515.

what he has no right to insist on, and the present action cannot be maintained.

Bramwell, L.J.:—

I am of the same opinion. I cannot help thinking that the Vice-Chancellor was acting under a misapprehension. The preamble of the Vice-Chancellor's judgment made me expect that he would have come to a different conclusion to that at which he did arrive. He says: "As to that particular stipulation, this is a case in which specific performance of the contract is of course entirely out of the question. Where conditions of this nature came into question in the authorities which have been referred to in the argument, the case has been one of specific performance or nothing. Here, from the circumstances of the case, specific performance is impossible. The thing is gone, the property is no longer capable of being taken or acquired by the purchaser, and the vendor is not in a position to give it . . . The Plaintiffs are seeking to have their deposit returned, with the costs, charges, and expenses they have been put to as purchasers." Now I should have thought that the Vice-Chancellor's reference to specific performance would have led him to a different conclusion; at all events, I do not see how it leads to the conclusion at which the Vice-Chancellor arrived.

With due deference to the Vice-Chancellor, I think the construction of the stipulation in question is plain. The words are, "He is to assume and admit that everything has been done," &c. If that is admitted, the purchasers had no objection to make to the conveyance which the vendor was ready to give them.

I asked Mr. *Dickinson* if he now admitted that everything had been done. He said "No." I then said, "If so, you are breaking the contract, and you cannot complain of the Defendant breaking it in the same matter." He said, "We must look at the whole contract, and the contract was that the vendor should give us a conveyance." The answer to that is, that the vendor could give a conveyance, even assuming that his title was defective. The only way to read the contract is that the purchaser is to be content with a mere conveyance of such title as the vendor had. The stipulation was a fair warning to the purchaser that there was something doubtful in the title as to that particular point, and the vendor said, "As to the price you will offer, that is for your consideration, but all I can give you is what I have." If the purchaser thought the doubt was of importance, he probably gave a less price for the land.

Could the vendor have maintained an action against the purchasers for refusing to complete the contract? I think he could, and that he would have recovered damages for breach of the contract, though he could not have received the balance of the purchase-money, for it has been held that that is only payable on the execution of the conveyance. If so, this action cannot be maintainable. When it was brought the Defendant had not parted with the land, had not broken, nor disabled himself from performing, his contract. But the foundation of the Plaintiffs' action is that the Defendant, when this action was brought, had broken his contract, or could not perform it. It cannot be that each party can maintain an action against the other, as that would be to suppose that each, in his action, could allege and prove against the Defendant in that action, that the Plaintiffs had in no respect, while the Defendant had, broken his or their agreement.

Then, is the vendor entitled to keep the deposit, although no specific performance of the contract is possible? Certainly, in my opinion, he was when this action was brought. I do not say that the deposit is forfeited. But the deposit is a security for the performance of the agreement, and the Plaintiffs had not then performed the agreement; therefore the Defendant was entitled to retain the deposit. Whether he is now, and to what extent, it is not necessary to say. There may be cases, even where there is an ~~no~~ express condition that the vendor shall be entitled to retain the deposit as a security for the performance of the agreement, yet the vendor, by some act of his own, precludes himself from retaining it, and has to repay it. But in the present case the Plaintiffs were not entitled to repayment of it at the time when the action was brought. The action, therefore, wholly fails and must be dismissed.

Solicitors for Plaintiff: *Taylor, Hoare, & Co.*, agents for *Horton, Lee, & Lee, Birmingham.*

Solicitors for Defendant: *Faithfull & Owen.*

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[1877 A. 153.]

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Feb. 5.

C. A.

May 13, 17, 19.

17 Ch D 717

736,

24 Ch D 283

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Injunction—Letters Patent—User of Invention—Master of Ship.

An action was brought against the master of a ship to restrain him from using pumps which were an infringement of the Plaintiff's letters patent. He denied having used any pumps which were an infringement of the patent, and did not suggest that the owners ought to be parties. It was shewn that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but had been so fitted up before the Defendant, who was not a part owner, had taken command of her; he had nothing to do with putting them on board, and they had never been worked in British waters.

Bacon, V.C., having granted an injunction to restrain the master from using the patented invention:—

Held, by *Brett* and *Cotton*, L.JJ. (*dissentiente*, *James*, L.J.), that the injunction was rightly granted on the ground that the Defendant, being in command of a ship exclusively fitted up with pumps which were an infringement of the letters patent, was intending to use the patented invention.

THIS was an action by a patentee to restrain the infringement of a patent for improvements in ships' pumps.

The action was originally commenced against the Defendant *Young*, who was the master of a ship called the *Polynesia*, then or then lately in the port of *Liverpool*, which belonged to Scotch owners, and was fitted up with pumps alleged to be an infringement of the Plaintiff's patent, and which had been supplied by *Wallace & Co.* *Young* insisted that the *Wallaces* ought to be before the Court, and by an order made on the 14th of January, 1878, they were added as Defendants. By their defence they insisted that the pumps were not an infringement, and the action proceeded to trial against them as well as *Young*. *Young* by his defence denied that he had used any pumps which were an infringement of the Plaintiff's patent, and did not allege that the owners ought to be parties.

It appeared that the *Polynesia* was fitted up exclusively with pumps made by the *Wallaces*, and alleged to be an infringement, but the ship being a new one had scarcely required the use of pumps, and the pumps had never actually been worked except at

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Buenos Ayres. The ship had been fitted up with them before *Young* took the command of her, and he had had nothing to do with her being supplied with them, and had no interest in the ship.

The action was tried before Vice-Chancellor *Bacon* on the 5th of February, 1879.

Kay, Q.C., and *Chadwyck Healey,* for the Plaintiff.

Aston, Q.C., and *MacClymont,* for the *Wallaces.*

Sir *H. Jackson,* Q.C., and *MacClymont,* for *Young.*

BACON, V.C.:—

The case of the Defendant *Young* and that of the Defendants the *Wallaces* differ entirely from each other. That of the Defendant *Young* is that he is merely the master of the ship which has been furnished with the pumps, that he had nothing to do with making them or putting them into the ship, and that they have not been used within the realm. The Defendants the *Wallaces* insist that the Plaintiff's letters patent are invalid on the ground that the invention was not new, and they deny that they have infringed any patent right belonging to the Plaintiff.

[His Lordship then entered into an examination of the case made by the *Wallaces,* and held that the Plaintiff was entitled to an injunction against them with an account of profits.]

As to the Defendant *Young,* the master of the ship *Polynesia,* on board of which the pumps I have mentioned remain, and by whom they may therefore be used, the Plaintiffs are entitled to an injunction to restrain any further use by him of the pumps which are in his possession and control. I cannot leave a man in undisturbed possession of a machine which I take to be an infringement. I cannot give him any costs, but I hope he will be under no difficulty in getting them.

A perpetual injunction was accordingly granted to restrain *Young,* and all persons acting under his authority during the continuance of the letters patent, from using, exercising, or putting in practice, or causing or permitting to be used, exercised, or put in practice the patented invention, and from using, or causing or permitting to be used, any pump constructed according to or upon the principle of or only colourably differing from the Plaintiff's invention. An injunction and an account of profits were granted against the *Wallaces.*

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The *Wallaces* and *Young* severally appealed. The appeal of the *Wallaces* having been dismissed with costs, the appeal of *Young* came on to be heard on the 13th of May.

Sir *H. Jackson,* Q.C., and *MacClymont,* for the Appellant:—

The exclusive right given by letters patent is to "make, use, vend, and exercise" the invention. *Young* has done no one of these things. He has never used the pumps within British waters.

[BRETT, L.J.:—The ship was fitted up with them. Must he not be taken to be using them?]

We submit not. The persons to be attacked are the owners of the ship, who are the only persons having a right to remove the pumps from the ship. *Caldwell* v. *Van Vlissengen* (1) shews the liability of the owners.

[JAMES, L.J.:—The captain is in this country, and is a bailee of a thing made in violation of a patent. Is he in a better position than any other bailee?]

We submit that he is not a bailee any more than a gentleman's coachman is bailee of his master's carriage; it remains in the custody of the owner. The terms of a monopoly are not to be enlarged: *Universities of Oxford and Cambridge* v. *Richardson* (2); and so in *Minter* v. *Williams* (3) it was held that to allege that a person "exposed for sale" an article made in infringement of a patent was not a sufficient allegation of a breach. The use of the invention must be within the *United Kingdom: Newall* v. *Elliott* (4); so a user on the high seas cannot be a breach. In *Neilson* v. *Betts* (5) the decision went on the ground that the capsules were in actual use, because they were answering the purpose of preserving the beer. But if there is a user, we say that the master cannot be liable personally. The position of a master is defined in *Abbott* on Shipping (1); *Story* on Agency (2). The master could not remove the pumps, so how should he be made liable for allowing them to remain in the ship?

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(1) 9 Hare, 415.

(2) 6 Ves. 689.

(3) 4 Ad. & E. 251.

(4) 10 Jur. (N.S.) 955.

(5) Law Rep. 5 H. L. 1.

[BRETT, L.J., referred to *Nicholson* v. *Mouncey* (3).]

Kay, Q.C., and *Chadwyck Healey*, for the Plaintiff:—

The master is more than an ordinary agent, he is a qualified owner: *Morse* v. *Slue* (4); *Nicholson* v. *Mouncey*.

[BRETT, L.J., referred to *Gunn* v. *Roberts* (5).]

Moreover, Courts of Equity grant injunctions against mere agents; the ordinary form of an injunction is to restrain the agents as well as the party. The sub-contractor of a railway is often sued.

[JAMES, L.J.:—He is the actual trespasser.]

And here the master is the person actually using the pumps. The case is governed by *Betts* v. *De Vitre* (6), where this very point was raised (7). According to the *Merchant Shipping Act*, 1871 (34 & 35 Vict. c. 110), s. 10, the Act of 1875 as to unseaworthy ships (38 & 39 Vict. c. 88), and the *Merchant Shipping Act*, 1876 (39 & 40 Vict. c. 80), it is essential to the seaworthiness of a ship that she should be properly equipped, and if she is not, the contracts with the seamen cannot be enforced. There is a user of the patent if patent pumps are employed in completing the equipment of the ship so as to make her seaworthy, though the pumps be not actually worked.

[JAMES, L.J.:—If I set up a patent pump in my house I may be said to be using the patent, but if I then lend my house, can the person to whom I lend it be said to be using the patent if he does not work the pump?]

The case, it is submitted, is not analogous. The person to whom the house is lent is not getting any benefit from the pump if he does not work it, his servants could not leave him if the pump was not there, but the mariners could leave the ship if there were no pumps. If the fact of the pumps being in the ship prevents the master from being liable for a misdemeanour in taking his ship to sea in an unseaworthy condition, he must be considered to be using them. In *Betts* v. *Neilson* (1) all the Defendants were agents; the principals were not parties.

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(1) 11th Ed. pp. 93, 302.
(2) § 314.
(3) 15 East, 384.
(4) 1 Mod. 85; 1 Vent. 190, 238.
(5) Law Rep. 9 C. P. 331.
(6) Ibid. 6 H. L. 319.
(7) 16 W. R. 529.

[JAMES, L.J.:—The judgment of Lord *Westbury* shews that the Defendants sent the bottles into *England*. If the agent actually does anything which infringes the patent he must be liable though he is only an agent. The question here is whether the Appellant did anything.]

There was as much user here as in *Betts* v. *Neilson*. The pump is performing its function in making the ship complete.

[BRETT, L.J.:—I thought the function of a pump had been to raise water.]

If having the pump on board the ship ready for use is not user there would be no remedy against the owner.

[JAMES, L.J.:—Is not the owner in a different position from a qualified owner like the master? The pump is put there by his authority, and he has power to remove it. The master has no power to remove it, and can he be said to use it if it is not worked?

COTTON, L.J.:—You may be said not to use a pump if it is not worked, but do you not use the invention if you keep the pump on board?]

Any one who uses the ship, which cannot be used unless it has pumps on board, must be considered to be using the pumps.

[JAMES, L.J.:—Suppose a ship supplied with common pumps having also a patent pump intended only for use on the high seas in case of emergency.]

That would not be this case. The patent pump would not be necessary to enable the ship to go to sea.

[BRETT, L.J.:—What do you say to *Minter* v. *Williams* (2)? If exposing for sale is not selling, can having a thing ready for use be using?]

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(1) Law Rep. 5 H. L. 1.

(2) 4 A. & E. 251.

An injunction would lie in such a case as *Minter* v. *Williams* (1). There would be a sufficient "threatening and intending" to sell.

[COTTON, L.J.:—In *Caldwell* v. *Van Vlissengen* (2) an injunction was granted only to restrain the use of the propeller in British waters. That tends to shew that having the propeller on board was not an infringement.]

That was not the case of an English ship. Moreover, in that case the master could never be obliged to use the propeller within British waters; here, if stress of weather comes on, the pumps must be used wherever the ship is.

MacClymont, in reply:—

To make a man liable as a tort feasor you must either shew that he is a principal, so that the maxim *respondeat superior* applies, or you must shew that he has done the act. The question of user has never been raised in any supreme Court except in the *United States,* where it was decided in *Brown* v. *Duchesne* (3) that bringing tackle into a port is not using it.

[BRETT, L.J.:—That case seems only to decide that the American patent laws do not interfere with the use of a patented invention on board a foreign ship in an American port.]

COTTON, L.J.:—

The question we have to decide is, whether, assuming the Plaintiff's patent to be good and the pumps on board the *Polynesia* to be an infringement of it, the decree is right in granting an injunction against the master. The case might have been different if he had said, "I am only the master; proceed against the owners. I have no wish to infringe the patent, and have no power to remove these pumps from the ship." He did not take this line; he did not suggest that the owners ought to be parties, but insisted that the makers ought to be parties, and joined with them in defending the action.

Now, first, is the master a person who, if he uses the invention on board the ship, is liable to an action? I think there is no doubt that he is. If an agent uses a patented invention he is liable, and the master of a ship is not a mere agent; he has a possession of a particular nature, and is not a mere servant of the owners.

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(1) 4 A. & E. 251.
(2) 9 Hare, 415.
(3) 19 Howard, 183, 196.

Has there, then, been a user of the invention on board the *Polynesia?* I do not give any opinion whether there has been such a user as would subject the master to an action for damages, but I think we must come to the conclusion that there has been such an intention to use the pumps as to lay sufficient ground for an injunction to restrain the infringement of the Plaintiff's patent rights. It appears from the master's own statement of defence that these pumps were the only pumps on board. He had the ship in British waters fitted up with these pumps ready for use, and if any accident had happened to the ship they would have been actually used within British waters. I therefore am of opinion that the master must be considered as intending to use them within British waters, and that on this ground the injunction ought to be sustained.

Brett, L.J.:—

I am sorry to be compelled to agree with the judgment which has just been delivered, for if I dared I would decide in favour of the master, and I think it a hardship that the action should have been brought against him; but we must determine according to law whether he is not liable. Now I cannot doubt that he is in possession of everything on board which has to be used in the navigation of the ship, and has control over everything on board which has to be so used. He therefore is in possession of the pumps, and has a right to decide whether they shall be used or not. I think that he has no power to remove them from the ship, and that if pumping were required he would be guilty of a breach of duty if he did not use them. His position is therefore one of extreme difficulty. Still the fact remains that he is the person who has to decide whether the pumps shall be used. When the ship came from *Buenos Ayres* he had control over them. They were used there, but have never been worked within British waters. It is said that nevertheless he used the invention. A distinction has been attempted to be made between using the pumps and using the invention, but I cannot see any such distinction. It is said that he was bound to have pumps on board, and would be liable if he put to sea without them; that they were necessary to make the equipment of the ship complete, and that therefore the having them on board was using them. Since the master had no power to say whether he would have them on board or not, he cannot, in my opinion, be said to use them unless he used them as pumps. If they are so used, that is a user by him, but in this case he never did so use them within British waters, and in my opinion, therefore, he never did infringe the patent. The case of the capsules is entirely different. The capsules were in actual use for the purpose for which they were made, preserving the beer in bottle; but here there is no proof of user by the master. Whether there was user by the owners is a different question, on which I give no opinion. It seems to me, therefore, that the injunction cannot be sustained on the ground that the master had infringed the letters patent.

If, then, the master had ceased to be master before the writ issued, I think he would have been free from all liability. But he is still in possession of the ship, and intends to command the ship, and the ship is intended to be used as a ship, and he has not referred to the owners, but stands merely on the ground that he has not hitherto used the invention. It is clear then that if not restrained he will use it, and I am of opinion that on this ground the injunction must be sustained.

JAMES, L.J.:—

As my learned Brothers are agreed it is immaterial that I cannot come to the same conclusion. I think that an injunction ought not to be granted against a man unless he has done something which he ought not to have done, or permitted something which he ought to have prevented. Now, a master who comes on board ought not to be answerable on the ground that when he takes the command, there is on board a pump which infringes a patent. He does not, owing to his qualified possession, become at once an infringer. He had no power to take a pump out of the ship, he had nothing to do with putting it there, and he was not wrong in allowing it to remain there, for he could not lawfully remove it. An injunction therefore can only be granted on the principle of *quia timet*, and in applying that principle I think it would be a right exercise of the discretion of the Court not to grant an injunction against a master who has done nothing wrong, when there is no difficulty in finding and suing the owner of the ship. I certainly should not have granted an injunction against him in this case, and in my judgment the injunction ought to be discharged.

May 19. JAMES, L.J.:—

I desire to add a few words to what I said on Saturday (May 17), in the case of *Adair* v. *Young*.

In the absence of the owners it appears to me that the Court could not make a mandatory injunction as to the equipment of the ship. And that being so, I cannot concur in granting an injunction to restrain the master from doing what it appears to me to be his plain duty to do. Whatever appliances there may happen to be on board, however they came there, pumps, anchors, fire-extinguishers, stolen or not stolen, pirated or not pirated, it is his bounden duty to use them according to the exigencies of navigation for the safety of ship, cargo, and life. To the master when out at sea (injunction or no injunction) *salus navis est suprema lex*. And for myself, I believe that a master would be practically as safe in disobeying an injunction under a pressing emergency as he would be in shooting a mutineer.

And in my opinion if a single life was lost through the master's neglect to use such appliances, the injunction would be no defence to an indictment for manslaughter.

COTTON, L.J.:—

I have nothing to add to what I said on Saturday.

Solicitors: *Wynne; Morton & Cutler.*

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June 11.

In re ORD.
DICKINSON *v.* DICKINSON.

[1876 O. 42.]

Will—Construction—Property acquired after Date of Will—Contrary Intention —Wills Act (1 Vict. c. 26), s. 24—Bequest of Annuity pur autre Vie— Duration of Annuitant's Interest—Death of Annuitant before Cestui que Vie.

A testator gave, after the decease or second marriage of his wife, all his leaseholds situate at *C.* to his son absolutely, charged nevertheless with the payment of all mortgage debts charged thereon, and "also with the payment of the annuity of £9 now charged thereon in favour of my sister."

The testator at the date of his will was possessed of two leasehold properties at *C.*, one subject to a mortgage, and the other subject to the annuity of £9. He acquired another leasehold property at *C.* between the date of his will and the date of his death:—

Held (affirming the decision of *Hall*, V.C.), that the after-acquired leasehold property passed under the gift to the son.

The testator also bequeathed to his son an annuity of £40 from the period of his majority to the death or second marriage of the testator's wife. The son attained twenty-one, and died before the widow:—

Held (affirming the decision of the Vice-Chancellor), that the legal personal representative of the son was entitled to the annuity until the death or second marriage of the widow.

THIS was an appeal from a decision of Vice-Chancellor *Hall*. The facts are fully stated in the report of the former hearing (1).

The following is a brief summary of them.

James Ord, a farmer, died on the 16th of May, 1860, having by his will, dated the 28th of March, 1859, devised and bequeathed all his estate, real and personal, to trustees, upon trust to pay the income to his wife for her life, if she should continue his widow, she thereout maintaining his children living at his death, provided that if his son *J. M. Ord* should attain twenty-one before he should become entitled to the testator's estate at *Chesterwood*, thereinafter bequeathed to him, he should be paid by the trustees, as his share of the income, £40 annually from the period of his majority to the death or second marriage of the testator's wife; and after her decease or future marriage the trustees were to

(1) 9 Ch. D. 667.

assign all the testator's leasehold houses, lands, and premises situate at *Chesterwood* (charged, nevertheless, with the payment of all mortgage debts charged thereon, and "also with the payment of the annuity of £9 now charged thereon in favour of my sister") to the son absolutely.

At the date of his will the testator was possessed of two leasehold properties situate at *Chesterwood*, one of them subject to a mortgage, the other charged with the annuity of £9. Between the date of his will and the time of his death the testator purchased another leasehold property situate at *Chesterwood*. The son died in the lifetime of the testator's widow. The Vice-Chancellor held that the after-acquired leasehold property passed under the bequest to the son, and that his legal personal representative was entitled to the annuity of £40 until the death or second marriage of the widow. The widow appealed.

Eddis, Q.C., and *Oswald*, for the Appellant, repeated the arguments which they adduced to the Vice-Chancellor, citing, on the question of the after-acquired leasehold, *Cole* v. *Scott* (1); *Hutchinson* v. *Barron* (2); *Webb* v. *Byng* (3); *Castle* v. *Fox* (4).

[BAGGALLAY, L.J., referred to *Douglas* v. *Douglas* (5).

Dickinson, Q.C., referred to *In re Midland Railway Company* (6).]

On the question of the duration of the annuity they cited *Savery* v. *Dyer* (7); *Hill* v. *Rattey* (8).]

Dickinson, Q.C., and *Armstrong*, for the widow, and

W. Brodrick, for the Plaintiff, were not heard.

JAMES, L.J.:—

I regret that I am unable to differ from the decision of the Vice-Chancellor on either point. The words of sect. 24 of the Act are very clear: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take

(1) 1 Mac. & G. 518; 1 H. & T. 477.
(2) 6 H. & N. 583.
(3) 1 K. & J. 580. 1 Jur NS 696
(4) Law Rep. 11 Eq. 542.
(5) Kay, 400.
(6) 34 Beav. 525.
(7) Dick. 162; Amb. 139.
(8) 2 J. & H. 634, 639.

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effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." I am unable to see in this will any evidence of a contrary intention. The words of the gift are, "In trust to assign and transfer all my leasehold houses, lands, and premises situate at *Chesterwood* aforesaid unto my said son *James Matthew Ord*, his executors, administrators, and assigns, for his and their own use and benefit." If those words had stood alone and the events had happened as they have, it is admitted that the leasehold estate acquired by the testator after the date of his will would have passed to the son. What is there to alter that result? In the gift which I have read there occur in a parenthesis, after the words "at *Chesterwood* aforesaid," the words "charged nevertheless with the payment of all mortgage debts charged thereon, and also with the payment of the annuity of £9 now charged thereon in favour of my sister *Mary Nicholson*." But the word "now," used as it is there, has no bearing whatever on the construction of the gift. The son is to take the property charged with something with which it is "now" charged. The fact that the charge was then existing and that the testator refers to it in that way has nothing to do with the property which is to pass under the words of gift. And that is the only occasion on which the testator uses the word "now." With regard to the direction that, if the testator's wife should desire to carry on his business of a farmer on his estate at *Chesterwood*, she should be at liberty to do so, until her death or future marriage, and that in that case the trustees of the will should allow her to occupy the farm and farm buildings, and to take and retain all the stock whatsoever "which shall be in and upon my said farm at the time of my decease," I was in hopes that I should have been able to find in that clause evidence of an intention to deal only with the property which the testator possessed at the date of his will. But, if the testator had sold the farm which he was occupying when he made his will, and had bought another, and had been occupying that at the time of his death, could we have held that the wife was not entitled to occupy that farm and to have the stock upon it? If we could not, that bequest does not assist us in construing the bequest to the son. The gift to the son, therefore, stands unaffected by anything else in the will. I cannot help expressing some regret at the result, for I do not think it was the intention of the Legislature to legislate for specific gifts of this kind. But it has been decided that such gifts are within sect. 24. With regard to the annuity, we may make a guess that the son was intended to have the £40 only for his personal maintenance, and it may be difficult to imagine why it should be continued after his death. But it is in express terms an annuity to be paid until the death or second marriage of the testator's widow, and there is nothing which justifies us in cutting it down to the life of the son. It has never been doubted that a gift of an annuity for a term or *pur autre vie* is a gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie.*

BAGGALLAY, L.J.:—

I am of the same opinion. *Primâ facie* after-acquired property passes by a will unless you can find evidence of a contrary intention in the will itself. The authorities have established this, that, when the date of the will, as contrasted with the time of the testator's death, is clearly referred to in the will—that is evidence of a contrary intention. That was decided in *Cole* v. *Scott* (1). There there was a clear contrast between the two dates in the gift itself, and it was held that the after-acquired property did not pass. It is suggested that there is the same contrast in the present case, by reason of the use of the word "now" with reference to the annuity charged on a part of the property bequeathed to the son. But all the testator says is that the property given to the son is to bear the charges upon it, whether mortgages or annuity. He speaks of the annuity "now charged" It was an existing annuity at the date of the will, but it might come to an end before the death of the testator by the death of the sister. The words are merely an indication of the particular charge. The argument all turns on that one expression, for in the residuary gift the testator speaks of all his real and leasehold estates "except my leasehold property hereinbefore bequeathed to my said son." This carries it no further than the original gift. Great reliance was placed on the direction that the widow should be at liberty to occupy the farm occupied by the testator, but that seems to me to carry the

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(1) 1 Mac. & G. 518.

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case no further. The inference is, I think, rather in favour of an intention that the after-acquired property should pass. With regard to the annuity, I felt at one time some doubt: I was disposed to think that it was intended only for the personal enjoyment of the son. But, on further consideration, I have come to the conclusion that there is no such limitation.

THESIGER, L.J.:—

I am of the same opinion on both points; and I have nothing to add.

Solicitors: *Bell, Brodrick, & Gray*, agents for *L. C. Lockhart, Hexham.*

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Ex parte BOUCHARD. *In re* MOOJEN.

Debtor's Summons—Act of Bankruptcy—Money paid into Court to secure Debt—Adjudication on Petition of another Creditor—Relation back of Trustee's Title—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *ss.* 6, 7, 9, 11.

14 Ch D 237
21 Ch D 607
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An alleged debtor having in November committed an act of bankruptcy by non-compliance with a debtor's summons, the summoning creditor presented a bankruptcy petition against him. He disputed the debt and applied to have the petition dismissed, and an order was made adjourning the petition *sine die*, on the terms of his paying £125 into Court, to abide the result of an action to be brought by the summoning creditor for the alleged debt. The £125 was paid into Court on the 18th of January, and the action was commenced on the 21st of January. On the 10th of May the debtor was adjudicated a bankrupt on the petition of another creditor. Afterwards judgment was entered in the action for the Plaintiff for the debt claimed and costs:—

Held, that the title of the trustee in the bankruptcy did not relate back to the act of bankruptcy committed on the debtor's summons so as to defeat the right of the summoning creditor to the £125, but that he was entitled to have the £125 paid out to him.

The act of bankruptcy committed by non-compliance with a debtor's summons is only a qualified act of bankruptcy.

Ex parte Wier (1) followed.

Ex parte Jay (2) explained.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

(1) Law Rep. 6 Ch. 875.

(2) Law Rep. 9 Ch. 133.

On the 19th of November, 1877, *E. M. Turnor* served a debtor's summons on *F. Moojen* for £107 8*s.* 4*d.*, alleged to be due from him in respect of a bill of exchange which he had accepted and had not paid at maturity. The summons was not complied with, and on the 15th of December *Turnor* presented a bankruptcy petition against *Moojen*, alleging the non-compliance with the summons as an act of bankruptcy. *Moojen* disputed the alleged debt, and applied to the Court to dismiss the petition. On the 11th of January, 1878, on the hearing of the petition, an order was made adjourning the further hearing until the 18th of January, upon *Moojen's* undertaking to pay into Court on or before the 17th of January £125, to abide the result of an action to be brought by *Turnor* in the High Court for the alleged debt, and that if the £125 should be paid into Court by that date the hearing of the petition should be adjourned *sine die*, with liberty to apply when the result of the action should have been ascertained. The £125 was not paid into Court on the 17th of January, but on the 18th of January, *Moojen* appearing and applying to pay the £125 into Court forthwith upon the terms of the former order, it was by consent ordered that the further hearing of the petition should be adjourned *sine die*. The £125 was paid into Court on the 18th of January by one *John Griffin*, who was *Moojen's* son-in-law, and who, at his request, had agreed to advance it for him. On the 21st of January an action was commenced in the Exchequer Division by *Turnor* against *Moojen* for £107 8*s.* 4*d.* On the 10th of May, 1878, *Moojen* was adjudicated a bankrupt upon a petition which had been presented on the 28th of February by another creditor. The trustee in the bankruptcy did not apply to be made a party to the action, and in fact did not know of it until January, 1879. On the 21st of January, 1879, an order was made in the action that the Defendant should be at liberty to withdraw his statement of defence, and that the Plaintiff should be at liberty to sign judgment for £107 8*s.* 4*d.* and the costs of the action. Judgment was signed on the 6th of February, 1879. *Turnor* then applied to the Court of Bankruptcy for payment of the £125 to him. The trustee opposed the application, alleging that his title related back to the act of bankruptcy committed on the debtor's summons, and that consequently the

£125 formed part of the bankrupt's estate, and ought to be paid to the trustee. It was admitted that the debt and costs exceeded £125. The Registrar ordered that the £125 should be paid to *Turnor*. The trustee appealed.

E. Cooper Willis (*Roxburgh*, Q.C., with him), for the Appellant:—

The title of the trustee relates back to the act of bankruptcy committed on the debtor's summons. Though no creditor but the summoning creditor can, under sect. 6 of the *Bankruptcy Act*, 1869, present a petition upon such an act of bankruptcy, the words of sect. 11 as to the relation back of the trustee's title are quite general. One creditor cannot, after the commission of an act of bankruptcy of which he necessarily has notice, obtain a security in this way to the prejudice of the other creditors. If the action had gone against *Turnor* the money must have been paid out to the trustee.

[JAMES, L.J.:—Would not *Griffin* have been entitled to have it back if it was not wanted for the particular purpose for which it was paid in?]

It was paid in in *Moojen's* name, and he had undertaken to pay it. If *Turnor* had gone on with his petition he would have obtained no advantage over the other creditors; why should he obtain an advantage by not going on?

[JAMES, L.J., referred to *Ex parte Crosbie* (1).]

In *Ex parte Furber* (2), *Bacon*, C.J., said (3) that the act of bankruptcy committed by non-compliance with a debtor's summons is not purged by the summoning creditor's accepting payment of his debt.

If the creditor comes into the Court of Bankruptcy he does so with knowledge of the risk that the debtor may become bankrupt before he can obtain payment.

[THESIGER, L.J.:—Is not what the Chief Judge said in *Ex parte Furber* contrary to the view of this Court in *Ex parte Wier* (4). There Lord Justice *Mellish* said (5), "When the debt

(1) 7 Ch. D. 123.
(2) 6 Ch. D. 181.
(3) 6 Ch. D. 191.
(4) Law Rep. 6 Ch. 875.
(5) Law Rep. 6 Ch. 880.

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is paid the act of bankruptcy committed at the expiration of the time mentioned in the debtor's summons ceases to be an act of bankruptcy on which the debtor can be adjudicated a bankrupt, and we think it at the same time ceases to be an act of bankruptcy to which the title of the trustee can relate back under the 11th section."

JAMES, L.J.:—The judgment in that case was the considered judgment of the Court.]

In *Ex parte Jay* (1) it was held that after an act of bankruptcy had been committed on a debtor's summons, and a petition had been presented and a receiver appointed, the receiver had no right to permit the debtor to pay part of the debt to the summoning creditor.

A debtor's summons can only be granted to a creditor, and in respect of a debt due: *Bankruptcy Act*, 1869, s. 7.

Winslow, Q.C., and *Finlay Knight*, for *Turnor*, were not heard.

JAMES, L.J.:—

It appears to me that the order of the Registrar was quite right. If anything wrong has been done it has been done by the Court itself. But I do not think anything wrong was done. In pursuance of sect. 9 of the Act a provision was made by the Court for the debt of a particular creditor. Sect. 9 provides that when the debtor denies that he is indebted to the petitioner, the Court, upon security being given for payment to the petitioner of any debt which may be established by him against the respondent, and of the costs of establishing it, may stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt claimed. That is what was done in the present case. I am of opinion that the equitable title of the petitioning creditor to the money was complete when it was paid into Court to abide the event of the action. After that the only question was, what was the event of the action. The money was to be the money of the creditor if he succeeded in establishing his title to it in the action, and he did succeed in so doing. It would

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(1) Law Rep. 9 Ch. 133.

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be idle to make such a provision if the whole thing was afterwards liable to be defeated by the relation back of the title of the trustee appointed under the petition of another creditor to the act of bankruptcy committed on the debtor's summons. The case is really governed by what was said by Lord Justice *Mellish* in *Ex parte Wier* (1), where the judgment was the considered judgment of the Court. What he said amounted to this, that the act of bankruptcy committed on a debtor's summons is only a qualified act of bankruptcy.

BAGGALLAY, L.J.:—

I am of the same opinion. The money was distinctly paid in under the provisions of sect. 9 as a security to the petitioning creditor for his alleged debt, and now that he has established the debt, there can, in my opinion, be no question as to his title to the money.

THESIGER, L.J.:—

I am of the same opinion. It appears to me that the payment of the money into Court under the order of the Court was equivalent to a conditional payment to the creditor. If the money had been actually paid to him under the order of the Court he would have been entitled to keep it, and I think the payment into Court was, when his debt was established, equivalent to a payment to him as of the date when the payment into Court was made. This conclusion is the legitimate consequence of the considered judgment of this Court in *Ex parte Wier*. *Ex parte Jay* (2) was different from the present case for this reason, that there was no fund for the security of the particular creditor, there were only funds in the hands of the receiver for the benefit of the creditors generally.

Solicitors for Appellant: *Willoughby & Cox.*
Solicitors for Respondent: *Pattison, Wigg, & Co.*

(1) Law Rep. 6 Ch. 875.

(2) Law Rep. 9 Ch. 133.

Applied. *Re* WEBB. [1951] 2 All E.R. 131.

WHEELDON *v.* BURROWS.

[1878 W. 50.]

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V.-C. B.
Nov. 14, 15, 21.
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1879
June 17.

Post 264
13 Ch D 801
14 Ch T
5 C P D 3
16 Ch D 358
21 Ch
22 Ch
24 Ch D

Easement—Implied Grant—Implied Reservation—Grants of adjoining Tenements—Sales at same Time.

By the grant of part of a tenement there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted and have been hitherto used therewith; but as a general rule there is no corresponding implication in favour of the grantor, though there are certain exceptions to this, as in the case of ways of necessity.

A workshop and an adjacent piece of land belonging to the same owner were put up for sale by auction. The workshop was not then sold, but the piece of land was then sold, and was soon afterwards conveyed to the purchaser. A month after this the vendor agreed to sell the workshop to another person, and in due time conveyed it to him. The workshop had windows overlooking and receiving their light from the piece of land first sold:—

Held, that, as the vendor had not when he conveyed the piece of land reserved the right of access of light to the windows, no such right passed to the purchaser of the workshop, and that the purchaser of the piece of land could build so as to obstruct the windows of the workshop:

Held, that, whatever might have been the case had both lots been sold at the same sale by auction, there was, under the circumstances, no implied reservation of any right over the piece of land first sold.

Judgment of *Bacon*, V.C., affirmed.

The decision in *Pyer* v. *Carter* (1) dissented from.

Suffield v. *Brown* (2) and *Swansborough* v. *Coventry* (3) explained.

THIS was an action by the owner in fee simple of a piece of land in *Derby*, for the purpose of restraining the owner of the land immediately adjoining from trespass; the Defendant pleading that the trespass was merely in exercise of his right to prevent any obstruction to the access of light through windows in a workshop belonging to the Defendant, adjacent to and overlooking the Plaintiff's land; and the action was in substance brought for the purpose of trying this alleged right.

Under conveyances dated in 1856 and 1857 respectively, one *Allen* became the owner in fee of both the tenements, the piece of land now belonging to the Plaintiff being divided from the rest

(1) 1 H. & N. 916.
(2) 4 D. J. & S. 185.
(3) 9 Bing. 305.

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by a wall. In 1858 *Allen* built close to this wall a shed, or workshop, which was lighted by skylights only. In 1861 *Allen* altered this shed, rebuilt and raised the wall belonging to it, and also raised the roof and abolished the skylights, and inserted four windows in the wall which he had raised. Of these windows one was afterwards covered by a millwright's shop built by *Allen* on that part of the land which had become the Plaintiff's, but there still remained in the wall of the shed built by *Allen* three windows, the subject of the present action. *Allen* continued in occupation of the whole until 1867, when he sold it to one *Woolley*. In 1871 *Woolley* conveyed the premises to *Tetley*, who in 1875 caused them to be advertised for sale by public auction. At the auction, on the 9th of November, 1875, *William Wheeldon*, the Plaintiff's husband and immediate predecessor in title, became the purchaser, for £200, of Lot 10, which was described in the particulars of sale as "All that valuable piece of eligible building land, containing by admeasurement 638 square yards, or thereabouts, situate in and having a frontage to *Stockbrook Street* of 40½ feet and a depth of 121 feet, or thereabouts, together with the building thereon, now used and occupied by Mr. *William Wheeldon* as a millwright's shop. This lot is suitable for the erection of a factory or mill." By deed dated the 6th of January, 1876, *Tetley* conveyed this lot to *William Wheeldon* in fee simple, by the description of "All that piece or parcel of land or ground containing by admeasurement 683 square yards or thereabouts, and having a frontage of 40 feet and one half to *Stockbrook Street*, Together with the building erected on part of the said piece of land and now used and occupied as a millwright's shop, which said piece of land and hereditaments are bounded on or towards . . . . the south by other hereditaments remaining the property of the said *Samuel Tetley* . . . . Together with all walls, fences, sewers, gutters, drains, ways, passages, lights, watercourses, mines, minerals, liberties, privileges, emoluments, rights, members, easements, and appurtenances whatsoever to the said piece of land and hereditaments belonging or in anywise appertaining, and all the estate, right, title, interest, use, trust, property, possession, claim and demand whatsoever of him the said *Samuel Tetley*, of, in, to, and upon the same hereditaments and premises."

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Lot 6, described in the particulars of sale as "All that valuable silk mill, elastic web manufactory, shops, and premises known as *Spa Mill,*" and including the above-mentioned workshop, was not sold at the auction; but by a contract dated the 18th of February, 1876, made on an altered particular of the sale by auction, the Defendant *W. T. B. Burrows* agreed to buy it for £2000. By an indenture dated the 7th of April, 1876, *Tetley* conveyed to *Burrows* the property comprised in this lot, describing it as bounded in part by a piece of land sold and conveyed to one *William Wheeldon*, "together with all houses, outhouses, edifices, buildings, yards, gardens, walls, fences, sewers, gutters, drains, ways, paths, passages, lights, waters, watercourses, liberties, privileges, emoluments, rights, members, easements, and appurtenances whatsoever to the said mill or factory, buildings, hereditaments and premises hereinbefore described, or any of them, belonging or in any wise appertaining, and all the estate, right, title, &c., whatsoever of him the said *Samuel Tetley* of, in, to, and upon the same hereditaments and premises."

The conditions of sale above referred to comprised the usual condition as to the lots being believed to be correctly described, and stipulated for their being sold subject to "all chief and quit rents and other out-payments, rights of way, and other easements (if any) affecting the same;" and then proceeded to stipulate expressly that Lot 1 was sold subject to a special right there mentioned in favour of the tenants and occupiers for the time being of Lot 2.

In January, 1878, the Plaintiff, the widow and devisee of *William Wheeldon*, erected boardings near the edge of her land facing the windows of the Defendant's shed, for the purpose of asserting her right to the uncontrolled use and possession of her land. The Defendant thereupon knocked down these boardings for the purpose of asserting his right to an easement of light in respect of the three windows, and the Plaintiff, Mrs. *Wheeldon*, brought this action to restrain the Defendant *Burrows* from trespass. The Defendant pleaded that the windows were, when the buildings were conveyed to him, apparent continuous easements necessary to the convenient enjoyment of the buildings; and that such windows or lights were then expressly or impliedly reserved to the grantor, and were now vested in the Defendant; that *Tetley* sold both tenements at about the same time and under the same conditions of sale, that the lights and easements of each tenement were reserved thereto and that the Plaintiff was not entitled to obstruct the same.

There was some evidence on the part of the Plaintiff, but the Defendant entered into no evidence, and relied on his legal right.

The action came on for trial before Vice-Chancellor *Bacon* on the 1st of November, 1878.

Horton Smith, Q.C., and *Romer*, for the Plaintiff:—

Upon the evidence these lights of the Defendants are not ancient lights.

[Sir *H. Jackson*, Q.C.:—I shall not contend that as between the Plaintiff and Defendant they are ancient lights.]

Whence, then, does the Defendant derive the right which he claims of an easement of light to these windows of his over the Plaintiff's land? Not from any reservation of it in the conveyance to the Plaintiff's testator; for that contains no such reservation. Not from the particulars and conditions of sale used at the auction (if, indeed, after the execution of the conveyance to the Plaintiff, they can be properly referred to); for in them not only is the land sold to the Plaintiff's testator expressly described as "building land"—a fact only inferentially appearing from the description in the conveyance—and as such presumably free from easements such as those claimed, which would interfere with building operations; but, where (as in the case of Lots 1 and 2) easements are intended to be created amongst the lots *inter se* they are expressly mentioned: *Russell* v. *Harford* (1). Not from any easement existing anterior to the conveyance to the Plaintiff's testator in January, 1876; for during the unity of ownership which existed continuously from 1857 down to the later period in the hands of *Allen*, *Woolley*, and *Tetley*, of the entirety of the land afterwards sold in parcels to the Plaintiff's testator and the Defendant respectively, there could be no easement in favour of any one of those parcels as against any other of the parcels.

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(1) Law Rep. 2 Eq. 507.

But it is said that the access of light to these windows was, at the date when *Tetley* executed his conveyance to the Plaintiff's testator, an apparent continuous quasi-easement necessary to the convenient enjoyment of the property retained and afterwards conveyed by him to the Defendant; and that, therefore, by the mere fact of the severance of the entire heritage by *Tetley*, the common owner, a reservation of such rights arose by legal implication in favour of *Tetley*, in the first instance, and afterwards of the Defendant who claims under him, although the Plaintiff's testator's conveyance contained no such reservation.

For such a contention reliance will no doubt be placed on the view of the law suggested by Mr. *Gale* in his Treatise on Easements (1) under the title of the disposition of the owner of two tenements in fancied analogy to the "*Destination du père de famille*" of the French law, and the note of his editor, Mr. *Willes* (2).

But Mr. *Gale's* doctrine and theory as applied to such a case as the present, where the alleged servient tenement is first conveyed without any reservation, are at variance with the fundamental principle that a man cannot derogate from his own grant, a principle which has been insisted and acted upon in the matter of easements of light from as early a period as the 3rd Anne: *Tenant* v. *Goldwin* (3), a case the authority of which, as militating against his theory, Mr. *Gale* seeks to disparage (4). They were expressly repudiated in the matter of easements of light in *White* v. *Bass* (5), which has been followed by *Curriers' Company* v. *Corbett* (6) and *Ellis* v. *Manchester Carriage Company* (7). And with reference to easements generally they were shewn to be unsound, as repugnant to the principle above referred to, and respectively characterised as "extraordinary" and "ingenious and fanciful" by Lord *Westbury* in *Suffield* v. *Brown* (8), a case which

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(1) Chap. iv. pp. 50 *et seq.*; 5th Ed. pp. 96 *et seq.*

(2) 5th Ed. pp. 102, 103, note (n): "The case of lights falls within the continuous and permanent class (of easements), and therefore that if a house-owner sells a piece of land adjoining his house, the buyer cannot build up against his windows."

(3) 2 Ld. Raym. 1093.

(4) 5th Ed. p. 99.

(5) 7 H. & N. 722.

(6) 2 Dr. & Sm. 355; 4 D. J. & S. 764, 771, per Lord Justice *Turner*. 11 Jur NS 779 780

(7) 2 C. P. D. 13.

(8) 4 D. J. & S. 185, 193, 199. 10 Jur NS 114

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disposes of *Pyer* v. *Carter* (1) as an authority in favour of Mr. *Gale's* theory, as does also the later case of *Crossley & Sons, Limited* v. *Lightowler* (2). The latter case did away also with the supposed materiality of the apparent and continuous nature of easements in such cases; and in the earlier case of *Dodd* v. *Burchell* (3) the Court of Exchequer refused to accede to all the propositions laid down by Mr. *Gale*, or to extend the doctrine of *Pyer* v. *Carter* beyond the circumstances of that particular case, preferring to construe the grant of the alleged servient tenement according to its terms.

Mr. *Willes*' note is contrary to and is disposed of by the case of *White* v. *Bass* (4), which was only decided nine days prior to the issue of his last edition of Mr. *Gale's* book, and was at the date of that issue probably not reported.

Reliance will also, no doubt, be placed upon some remarks attributed to the Lords Justices during the argument in *Watts* v. *Kelson* (5). But those remarks were mere *obiter dicta*, not necessary under, nor even warranted by, the circumstances of the case before the Court, which was a case of prior conveyance of the dominant tenement. They do not profess to impugn the authority of the decision in *Suffield* v. *Brown* (6), which, indeed, the subsequent considered judgment of the Court admits, but only the observations which Lord *Westbury* made upon *Pyer* v. *Carter* in the course of his judgment. They were made without a full discussion of the point of law involved; and clearly go too far in describing most of the Common Law Judges as not having approved of Lord *Westbury's* observations: *Dodd* v. *Burchell* (7); *Pearson* v. *Spencer* (8); *Polden* v. *Bastard* (9).

Moreover, even if the approval which they seem to convey of the decision in *Pyer* v. *Carter* could, after the disapproval of it on principle by Lord *Westbury* in *Suffield* v. *Brown*, and by Lord *Chelmsford* in *Crossley & Sons, Limited* v. *Lightowler* (10), rehabilitate it as an authority—an effect which we submit that apparent approval could not have—still the case, one of a drain presumably an easement of necessity and obstructed by the Defendant under very peculiar circumstances, would not affect the present, which is one of lights and wherein the law is settled otherwise.

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(1) 1 H. & N. 916.

(2) Law Rep. 3 Eq. 279; Ibid. 2 Ch. 478, 486.

(3) 1 H. & C. 113.

(4) 7 H. & N. 722.

(5) Law Rep. 6 Ch. 166, 170, 171.

(6) 4 D. J. & S. 185. 10 Jur NS 111

(7) 1 H. & C. 113, 121.

(8) 3 B. & S. 761, 762.

(9) Law Rep. 1 Q. B. 156, 160.

(10) Law Rep. 2 Ch. 478, 486.

The only case where an easement is properly held to arise by implication on the severance of an entire heritage by the common owner is that of easement of necessity. But on the evidence in the present case no case of necessity exists. The Defendant's tenement can now, as it did originally, obtain its light by means of skylights in the roof. *White* v. *Bass* (1) is in fact an exception to the continuous stream of authority upon this point which runs in favour of the law as laid down in *Pyer* v. *Carter* (2). The decision of the Court of Appeal in the case of *Curriers' Company* v. *Corbett* (3) really reduces what was said in that case on the point to a *dictum;* whilst *Ellis* v. *Manchester Carriage Company* (4) added nothing to the authority of the preceding cases, which it simply followed.

Sir *H. Jackson*, Q.C., and *Colt*, for the Defendant:—

Although the conveyance to the Plaintiff's testator did not expressly reserve this easement of light in respect of the lot purchased by the Defendant, it is clearly established that upon a severance of unity of possession in a house and adjoining land, all easements necessary for the enjoyment, and beneficial use and occupation of the house, and in their nature continuous and apparent as distinguished from easements used from time to time only, will, in the absence of anything in the conveyance to negative this presumption, be reserved by implication of law without the necessity of express words of reservation, even though such easements had no legal existence before the severance: *Gale* on Easements (5) and Mr. *Willes*' note (6); *Dart's* Vendors and Purchasers (7); *Pyer* v. *Carter*; *Davies* v. *Sear* (8); *Worthington* v. *Gimson* (9); *Wardle* v. *Brocklehurst* (10); *Hinchliffe* v. *Earl of*

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(1) 7 H. & N. 722.

(2) 1 H. & N. 916.

(3) 2 Dr. & Sm. 355; 4 D. J. & S. 764. 11 Jur. N.S. 719

(4) 2 C. P. D. 13.

(5) 5th Ed. pp. 96 *et seq*

(6) Pages 102, 103.

(7) Page 537.

(8) Law Rep. 7 Eq. 427.

(9) 2 E. & E. 618. 6 Jur. N.S. 1053.

(10) 1 E. & E. 1058. 6 Jur. N.S. 320

Kinnoul (1); *Pinnington* v. *Galland* (2). No doubt the authorities are in some conflict, but the rule above stated, viz., that the purchaser of the land cannot obstruct the lights of the house any more than the vendor, who could not derogate from his own grant, for the windows are necessary and essential to the enjoyment of the house, and the purchaser of the land takes it subject to the restriction that he may not build so as to obstruct the light, has been established from the earliest times: *Nicholas* v. *Chamberlain* (3); *Palmer* v. *Fletcher* (4); *Compton* v. *Richards* (5); *Goddard* on Easements (6); *Swansborough* v. *Coventry* (7); *Pyer* v. *Carter* (8); which has been expressly recognised as a binding authority in *Ewart* v. *Cochrane* (9), in *Watts* v. *Kelson* (10), and in *Morland* v. *Cook* (11). The right of the Defendant to this easement by implied grant or reservation is not affected by the circumstance that the properties were parted with on one or on several occasions, or in one order or another: *Pinnington* v. *Galland; Richards* v. *Rose* (12).

[*Horton Smith*, Q.C.:—The *dictum* of Mr. Baron *Parke* in question is overruled by the subsequent decision of the same Court in *White* v. *Bass* (13).]

Nor does it matter whether the easement was only *de facto* used and enjoyed, or whether it was originally created before unity of possession took place, and then ceased to exist as a matter of right: *Kay* v *Oxley* (14); *Polden* v. *Bastard* (15).

The observations of Lord *Holt* in *Tenant* v. *Goldwin* (16) (which have been relied on in this and in other cases) are, as pointed out in *Gale* on Easements (17), mere *dicta* not to be found in the case as reported (18); while in the same case (19) all that is said is: "If he had sold the vacant ground without reserving the benefit of

(1) 5 Bing. N. C. 1.
(2) 9 Ex. 1.
(3) Cro. Jac. 121.
(4) 1 Lev. 122.
(5) 1 Price, 27.
(6) Page 169.
(7) 9 Bing. 305.
(8) 1 H. & N. 916.
(9) 4 Macq. 117, 122, 123.
(10) Law Rep. 6 Ch. 166.
(11) Ibid. 6 Eq. 252.
(12) 9 Ex. 218.
(13) 7 H. & N. 722.
(14) Law Rep. 10 Q. B. 360, 367.
(15) Ibid. 1 Q. B. 156.
(16) 2 Ld. Raym. 1093.
(17) Page 99.
(18) 1 Salk. 360.
(19) 6 Mod. 314.

the lights, the Court doubted in that case that the vendee might build so as to stop the lights of the vendor, because he had parted with the ground without reserving the benefit of the lights."

[*Horton Smith*, Q.C.:—By *Sheridan* and other writers of the last century "doubt" is generally used as "think," in exactly the opposite sense to that in which we now understand the word (1).]

Even if *Suffield* v. *Brown* (2) is not overruled by *Watts* v. *Kelson* (3), Lord *Westbury's* decision does not affect this case, as the easement there was neither apparent nor continuous, and consequently not one of which the purchaser would necessarily have notice. And a similar remark applies to *Crossley & Sons, Limited* v. *Lightowler* (4).

But in point of fact the purchases made by the Plaintiff's testator and the Defendant respectively, although in point of form successive, were in substance purchases of parcels of property arranged by the common owner for sale at one and the same time, and as part of one and the same transaction. Had both lots been actually sold at the same time, the right which the Defendant now claims would have been held reserved as against the Plaintiff's testator: *Swansborough* v. *Coventry* (5); *Compton* v. *Richards* (6); *Goddard* on Easements (7). And the common owner buying in the dominant tenement at the auction must be taken to have in effect himself purchased it, so as to establish its right to the easements claimed, and to have afterwards passed them by his conveyance to the Defendant, and the latter has consequently a right to them. So far as any presumption arises on the terms of the Plaintiff's testator's conveyance, it is in favour of the reservation of the easement, as the property conveyed to the Plaintiff's testator is described as bounded by hereditaments which remained the property of the vendor.

Horton Smith, in reply.

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(1) Compare *Gulliver's Travels*, Part II.: "The captain understood my raillery very well, and merrily replied with the old English proverb, 'that he *doubted* mine eyes were bigger than my belly, for he did not observe my stomach so good, although I had fasted all day.'"

(2) 4 D. J. & S. 185.

(3) Law Rep. 6 Ch. 166.

(4) Law Rep. 3 Eq. 279; Ibid. 2 Ch. 478.

(5) 9 Bing. 305.

(6) 1 Price, 27.

(7) Page 138.

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BACON, V.C., after stating the facts continued:—

The arguments of counsel on both sides have occupied considerable time, which has been chiefly occasioned by references to the very numerous authorities, but the principles of law insisted on by the Plaintiff are, that the Defendant's vendor not being entitled to any prescriptive right to the lights in question, and no mention of them having been made in the conveyance to the Plaintiff's predecessor in title, an absolute, unqualified, unrestricted right to the land passed by that conveyance, and that to hold the contrary would be repugnant to the well-established rule of law that a grantor cannot derogate from his grant. The Defendant, on the other hand, asserts and insists that the three windows in question constituted a continuous easement—that it was open and notorious, and that, although no mention is made of it by way of reservation or otherwise in the conveyance through which the Plaintiff claims, it must in point of law be held that a reservation of the vendor's rights to it must be implied; and that such implication is as extensive and as effectual as if the reservation had been in terms, and unequivocally, expressed in the conveyance under which the Plaintiff claims.

In support of the Plaintiff's contention many cases were referred to, all of which it cannot be necessary that I should mention. It cannot be expected that the particular facts on which the questions in those cases arose should be identical, or even closely resembling each other in each case. It is enough if a conclusive and clear principle of law is deducible from them, and must be recognised in every case in which it is applicable. In *White* v. *Bass* (1), decided in 1862, the Plaintiff was entitled to a house which had been conveyed to him by the owner of that house, and of some adjoining land. Before this conveyance the owner of both land and house had demised the land for a term, with a covenant by the lessees to build according to a plan, and the owner afterwards conveyed to the lessees the reversion in fee of the same land without reservation, whereupon the covenant to build became of necessary consequence merged in the reversion.

At a subsequent date he conveyed the house in fee to the then Plaintiff's predecessor in title. The owners of the land subsequently built upon the land so as to obstruct the light and air which for more than twenty years had come to the house of the Plaintiff, who thereupon brought an action of trespass, and the question came to be decided on a special case before the full Court of Exchequer. There it was argued for the Plaintiff, as it has been argued here, that the reservation of the vendor's existing lights passed to the purchaser by implication, and the authorities from *Palmer* v. *Fletcher* (1) were cited and commented on, as they have here also been. The Barons of the Exchequer, however, decided in favour of the Defendants. In the course of the argument Baron *Martin* asks: "What authority is there for saying that if a man has a house and a piece of land adjoining it, and he sells the land, there is an implied grant that the purchaser shall not build upon it so as to obstruct the light of the house?" The judgment of the Court as delivered is clear, express, and pointed. The Lord Chief Baron says (2): "In construing a conveyance of land we must collect what the parties intended from the language they have used. . . . In that conveyance there is no covenant by the purchasers not to build on the land so as to obstruct the light and air coming to the windows of the Plaintiff's house, nor indeed any limitation of the right to use the land." Baron *Martin*, enunciating the rule of law applicable to the case, says: "The conveyance of the reversion in fee of the land to the lessees is in the most general terms. It is contended that, notwithstanding the grant of the land in those terms, the purchasers are restricted in their use of it, so that they cannot make any erection upon it which obstructs the light and air of the Plaintiff's house. I know of no authority for that position. There is an absolute conveyance of the land which, as against the grantor, gives every right which a grantee would have, that is, to use it in a lawful way;" and the other Barons concur in the judgment.

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(1) 7 H. & N. 722.

In *Suffield* v. *Brown* (3) a case arose in which the question of law, which is the same as that before me, although the facts are of necessity not the same, was most fully argued. Every one, or if not every one, all the important decisions bearing upon that point, including the opinions of text-writers, were cited and discussed.

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(1) 1 Lev. 122.

(2) 7 H. & N. 730.

(3) 4 D. J. & S. 185. 10 Jur N.S. 111

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The case stood over for the judgment, which was some weeks afterwards delivered by Lord *Westbury*. I read the facts of the case from the marginal note, which appears to me to be accurately expressed. The judgment, which is at once exhaustive of the subject and a clear exposition of the law upon it, contains these passages:—[His Lordship referred to the following passages from pp. 191, 192: "The effect of this is, &c.—This is a very serious and alarming doctrine; I believe it to be of very recent introduction; and it is in my judgment unsupported by any reason or principle when applied to grants for valuable consideration;" and (p. 194) in reference to Mr. *Gale's* doctrine: "But I cannot agree that the ✓ grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor."] (4)

In the course of his judgment the Lord Chancellor expressed his dissent from the judgment of the Court of Exchequer in *Pyer* v. *Carter* (1); and, the Lords Justices having on a subsequent occasion (in *Watts* v. *Kelson* (2)) expressed a contrary opinion, Lord Justice *Mellish* thinking that *Pyer* v. *Carter* "is good sense and good law," and adding that "most of the Common Law Judges have not approved of Lord *Westbury's* observations on it," and Lord Justice *James* having said, "I am satisfied with the decision in *Pyer* v. *Carter*," it has been suggested that some doubt is thrown upon the Lord Chancellor's judgment in *Suffield* v. *Brown* (3). But I think there is no ground for such a suggestion, for whether *Pyer* v. *Carter* was rightly decided or not does not affect the Lord Chancellor's decision on the case before him.

I am not under the necessity of expressing any opinion on the subject, but that Lord *Westbury* was not alone in the view which he took of that case is apparent from the observations of another Lord Chancellor in *Crossley & Son, Limited* v. *Lightowler* (4). There the late Lord *Chelmsford*—*clarum et venerabile nomen*—a name which I cannot utter without a painful reflection that by his recent death the country has been deprived of a most learned, experienced, and able Judge, and that I have lost a dear friend of more than fifty years' standing—speaking of Lord *Westbury's* view of *Pyer* v. *Carter* (1), said, "I entirely agree with this view." But, what is more to the purpose on the present occasion, he also laid down a plain rule of law in these terms: "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shews the contrary by expressly reserving it. The argument of the Defendants would make in every case of this kind an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity."

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(1) 1 H. & N. 916.
(2) Law Rep. 6 Ch. 170.
(3) 4 D. J. & S. 185. / 12 Jur N.S.
(4) Law Rep. 2 Ch. 486.

(4) See 10 Jur N.S. 112/13.

In *Curriers' Company* v. *Corbett* (2) Vice-Chancellor *Kindersley* said: "It has been determined that if a person having a house on his land, the windows of which have existed for more than twenty years, sells a portion of the land, the purchaser may erect any buildings he pleases upon the lands so sold to him, however much they may interfere with the light coming to the windows of the vendor's house. That seems clearly to be the law, though it must be admitted that this law, if carried to an extreme, would in some cases produce great and startling injustice. I must hold, that on the portion of the land sold by the Plaintiff to the Defendant the latter may build what he pleases."

And in a still more recent case, *Ellis* v. *Manchester Carriage Company* (3), it was held, upon the authority of the cases referred to in the argument before me, that notwithstanding the Plaintiff's house had acquired an absolute and indefeasible right at the time of the conveyance, yet, inasmuch as the conveyance was without reservation, the Defendants were guilty of no wrongful obstruction of the Plaintiff's lights.

Now, that being the state of the law, as expressed by numerous clear, unqualified decisions, the Defendant has cited and relies upon the cases by which it has been decided that, with respect to continuous easements, the absence of any mention in the conveyance of any reservation is not inconsistent with a reservation by implication. And *Pyer* v. *Carter* was cited and relied upon by the Defendant's counsel, and several other cases, many of which were cited, commented upon, and answered by the Judges in *White* v. *Bass* (1), were referred to. Thus, *Compton* v. *Richards* (2) is explained and disposed of by Baron *Channell* in *White* v. *Bass* (3); *Pinnington* v. *Galland* (4) is covered by the observations of Baron *Martin* (5). All the cases in which a reservation has been implied are cases in which the necessity of the case required such an implication. Why? Because the thing sold and conveyed could not be enjoyed by the grantee in the manner and to the extent which it was plainly by the parties intended that it should be, unless such implication were made. Thus, a right of way was held to exist because the enjoyment according to the contract could not be had without it; of two houses affording mutual support to each other, it was held to be implied that the purchaser of one could not pull it down, because to do so would destroy the other. On the purchase of two similar houses in a symmetrical terrace by different persons, it was held by implication that one could not build in the rear so as to obstruct the other; and the purchaser of land supplied by pipes from a conduit on the vendor's land was held to be entitled to a continuance of the supply, although it had not been in terms conveyed to him.

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(1) 1 H. & N. 916.

(2) 2 Dr. & Sm. 360. 11 Jur. N.S. 719

(3) 2 C. P. D. 13.

But I take it that the rule of implication is founded upon the mere necessity of the case, and the impossibility of admitting that the contract and the intention of the parties to it would be complete without the implication. The subject of the implication is held to have been involved in the terms of the contract, and the justice and honesty of the transaction require that the law should supply that, the expression of which by the inadvertence of the parties has not been expressed in words. Upon this principle every one of the cases referred to is founded, and all are reconcilable; and no case has been cited, nor, as I believe, can any be found, in which an implication has been made not based upon necessity and the justice which that necessity imperatively calls into active operation.

It cannot, I think, be said that any such necessity exists in the present case, as renders it expedient that the vendor of Lot 6

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(1) 7 H. & N. 722.
(2) 1 Price, 27.
(3) 7 H. & N. 728.
(4) 9 Ex. 1.
(5) 7 H. & N. 729.

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should reserve to himself any right over Lot 10 which would exclude or restrict the grantee of Lot 10 to use and enjoy it without qualification or restriction. It was not necessary that the windows in the shed should exist. It is not suggested that there is any particular manufactory carried on in the shed, or that any peculiar position of windows and condition of light are requisite for the full enjoyment by the vendor of that portion of his property which he retained after he conveyed the land to the Plaintiff without reservation. Windows might have been inserted by the vendor on the other side of his shed, or he might have reverted to his former contrivance of lighting it by skylights. 1) My judgment in this action must therefore be for the Plaintiff, and I desire it should be understood that it is based upon the principle I have stated, and which I consider to be fully and clearly established by the general law, and especially and pointedly by the cases I have referred to.

2) If, however, I went further into the case, and considered it upon the evidence which has been adduced, and which is wholly uncontradicted, I should find abundant proof that it was not the intention of the parties that the conveyance to the Plaintiff's predecessor should contain any reservation; but, on the contrary, that it was intended that it should be, as it is expressed, absolute and unqualified. For the vendor advertises and describes the land in Lot 10 as "building land," when he was the owner of the adjacent land (but not the owner of ancient lights, as in *Swansborough* v. *Coventry* (1)); and he sells and conveys Lot 10 some not inconsiderable time before he sells and conveys Lot 6 to the Defendant; and the Defendant, before he purchased, knew of this state of things—inquired whether he would be entitled to the light by the windows if he purchased—was told that he would not be so entitled, and in these circumstances he completed his purchase, and afterwards chaffered with the Plaintiff's predecessor for the purchase of his rights. My decision, however, I repeat, is not based upon the facts I have last adverted to, but upon what I take to be a plain principle of law; and it is unnecessary for me to say what I should have thought of the case upon the evidence if I had not been guided by this principle.

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(1) 9 Bing. 305.

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The order, therefore, will be that the Plaintiff is entitled to an injunction restraining any further trespass by the Defendant upon the Plaintiff's land, and to an inquiry as to the damage sustained by the trespass complained of, unless the Defendant is contented to adopt the sum (£5) proved by the Plaintiff to be the amount of such damage, and to the costs of the action, the counter-claim in which will be dismissed.

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The Defendant appealed. The appeal came on to be heard on the 17th of June, 1879.

Sir *H. Jackson*, Q.C., and *Colt*, for the Appellant:—

We claim the lights as apparent, necessary, and continuous easements: *Pyer* v. *Carter* (1). Since *Watts* v. *Kelson* (2) the law must be taken to be that when a person conveys two tenements to different persons there is in each conveyance an implied reservation of all necessary and apparent easements. The two conveyances were part of the same transaction, and the case is thus brought within *Swansborough* v. *Coventry* (3). We do not claim to protect the lights as ancient lights, but to protect them from a blocking up which will make the Defendant's building absolutely useless. There are only three cases against us, all cases decided by a Court of first instance, *White* v. *Bass* (4), *Curriers' Company* v. *Corbett* (5), and *Ellis* v. *Manchester Carriage Company* (6), which simply followed the two former cases. These cases are summed up in *Goddard* on Easements (7), and form an exception from the general law of easements, and this exception, if carried out, would, as Vice-Chancellor *Kindersley* observed, produce great injustice. In *Richards* v. *Rose* (8) it was held that the order of the conveyances made no difference. *Suffield* v. *Brown* (9) has no direct bearing on the case, and has chiefly been brought into these discussions on account of the remarks made by Lord *Westbury* on *Pyer* v. *Carter*; and the authority of that case has been much shaken

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(1) 1 H. & N. 916.
(2) Law Rep. 6 Ch. 166.
(3) 9 Bing. 305.
(4) 7 H. & N. 722.
(5) 2 Dr. & Sm. 355.
(6) 2 C. P. D. 13.
(7) 2nd Ed. p. 168.
(8) 9 Ex. 218.
(9) 4 D. J. & S. 185.

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by *Watts* v. *Kelson* (1); even on the face of it the judgment in that case is not consistent, as it admits that there may be an implied reservation as in *Richards* v. *Rose* (2). At all events it was the decision of a Lord Chancellor which may be overruled by this Court, just as the judgment of a Lord Chancellor may be reversed on a rehearing.

22 ChD 210

[JAMES, L.J.:—For us to reverse the judgment of a Lord Chancellor would require a tremendous case—a case of a clear error.]

Pyer v. *Carter* (3), if shaken, has been set up by *Watts* v. *Kelson*. *White* v. *Bass* (4) turns upon an old case which has been doubted, *Gale* on Easements (5); and the general principle that light is an appurtenance was there overlooked: *Compton* v. *Richards* (6). But besides this, here both conveyances were practically made together although a short interval of time intervened: *Swansborough* v. *Coventry* (7). At a sale by auction the purchaser of Lot 1 may rely on the conditions of sale as to the other lots, and cannot be injured because Lot 2 was not sold on that day. If there was a sale by auction of lots of land, and the condition was that there were to be restrictive covenants, the vendor must be as much bound as to the unsold lots as he would have been as to those which were sold.

[JAMES, L.J., referred to *Eastwood* v. *Lever* (8). If the contract had bound the vendor, and the purchaser wished to have a reservation of any ancient lights, he should have asked to have it put into his conveyance.]

Ancient lights pass with the appurtenances and need not be specified: *Dart's* Vendors and Purchasers (9). If the other land had belonged to a stranger the lights would not have been specified, and where is the difference? In no published precedent are ancient lights specified. In *Ewart* v. *Cochrane* (10) *Pyer* v. *Carter* was recognised. *Crossley & Sons, Limited* v. *Lightowler* (11) was a very different case. A right of way is very similar and may be implied, *Davies* v. *Sear* (1), because the purchaser has notice; and the case of windows is exactly the same. A grant conveys all things which are necessary for the enjoyment of the thing granted: *Hinchliffe* v. *Earl of Kinnoul* (2); *Morris* v. *Edgington* (3); including of course all lights hitherto enjoyed.

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(1) Law Rep. 6 Ch. 166.
(2) 9 Ex. 218.
(3) 1 H. & N. 916.
(4) 7 H. & N. 722.
(5) 5th Ed. p. 99.
(6) 1 Price, 27.
(7) 9 Bing. 305.
(8) 4 D. J. & S. 114.
(9) 5th Ed. p. 537.
(10) 4 Macq. 117, 122
(11) Law Rep. 2 Ch. 478.

Horton Smith, Q.C., and *Romer*, for the Plaintiff, were not called upon.

THESIGER, L.J.:—

The material facts of this case are short and simple. Prior to the month of November, 1875, a person of the name of *Samuel Tetley* was the owner of certain property in *Derby*, which included a piece of vacant land having a frontage to the street, and a silk manufactory and certain workshops at the rear of and abutting upon that vacant land, having in one of the workshops certain windows which opened upon that land. Owning this property, *Tetley* was minded to sell it, and appears to have put it up in several lots for sale by auction; and in respect of some of the lots, including a lot which was afterwards sold to the Defendant, the sale by auction was abortive. However, an agreement was made at the auction to sell one of the lots to the Plaintiff's husband, and that lot was conveyed to him upon the 6th day of January, 1876, with these general words, "together with all walls, fences, sewers, gutters, drains, ways, passages, lights, watercourses," and the other general words, "easements and appurtenances whatsoever to the said piece of land and hereditaments belonging or in anywise appertaining." The conveyance contains no reservation in express terms of any right to the grantor in respect of his other land. On the 18th of February, a contract was made by which *Tetley* contracted to sell to the Defendant the silk manufactory and the workshop which had the windows opening upon the land previously sold and conveyed to the Plaintiff's husband. This action arises from a claim on the part of the Defendant to have as of right the light enter into those windows, or, to put it in another way, to prevent the Plaintiff from obstructing these windows by building on her land. Upon the matter coming before the Vice-Chancellor, he held that no right in respect of the windows was reserved, either impliedly or expressly, under the conveyance of January, 1876; and, consequently, that the Defendant, as privy in estate with the grantor of the land which was the subject of the conveyance, was entitled to no right of light through those windows: in other words, he decided that the Plaintiff was entitled to build upon her land, although the result of that building might be to obstruct these lights. I am of opinion, both upon principle and upon authority, that the Vice-Chancellor decided rightly.

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(1) Law Rep. 7 Eq. 427.

(2) 5 Bing. N. C. 1.

(3) 3 Taunt. 24.

13 Ch D. 804
16 Ch D 35
21 Ch D 5

We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. 1. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. 2 Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern inven-

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tion, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by and which is to be attributed to Lord *Westbury* in *Suffield* v. *Brown* (1), it appears to me that it has existed almost as far back as we can trace the law upon the subject; and I think it right, as the case is one of considerable importance, not merely as regards the parties, but as regards vendors and purchasers of land generally, that I should go with some little particularity into what I may term the leading cases upon the subject.

The first case to which I refer is *Palmer* v. *Fletcher* (2), where the first proposition which I have stated as a general rule was laid down or decided. The other proposition was mooted, but there was a difference of opinion amongst the members of the Court upon it, and it was not decided. [His Lordship then read the report.] It appears therefore that upon the proposition that if a man wishes to derogate from his grant or to reserve any right to himself he should state so in the grant itself, there was a difference of opinion in the Court, and that point was not decided.

The next case of importance is *Nicholas* v. *Chamberlain* (3). [His Lordship then read the report, calling attention to the words "necessary *et quasi* appendant thereto."] Now if that determination is held to mean that in all cases this doctrine of implied reservation stands upon exactly the same footing as the doctrine of implied grant, I think it will be found that over and over again that has been overruled. But it is clear, as I have already suggested, that to the second rule under which a man is prevented from derogating from his grant there are certain exceptions, one of those being in regard to easements which have been called of necessity; and if *Nicholas* v. *Chamberlain* only decides that point it appears to me to be quite right. That *Nicholas* v. *Chamberlain* was not meant to decide more than what I have suggested is, I think, shewn by the next case, *Tenant* v. *Goldwin* (4). There ~~Lord~~ *Holt*, in delivering the judgment of the Court, deals with

(1) 4 D. J. & S. 185. 10 Jur N.S. 111

(2) 1 Lev. 122.

(3) Cro. Jac. 121.

(4) 2 Ld. Raym. 1089, 1093.

that very point which had been mooted in *Palmer* v. *Fletcher* (1); and he says, "As to the case of *Palmer* v. *Fletcher*, if, indeed, the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground, and kept the house without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." I think it will be found that, putting aside the case of *Pyer* v. *Carter* (2), there has been no distinct decision which in any way affects the principle laid down in those clear and distinct terms by Lord *Holt*.

The next case to which I will refer is *Swansborough* v. *Coventry* (3), which has been cited on both branches of the argument addressed to us by Sir *Henry Jackson*. That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of which the easement was claimed had been conveyed first; consequently the case would be one in which a grant of the easement would be implied. Now observe what that admits, and the argument so dealt with upon that footing. It admits that priority in time of the conveyance was a material point for consideration, because, if it had not been admitted, then the Court might have gone to the general question, not whether the conveyances were at the same time, not whether one preceded the other by a few minutes, or a few days, or by a few years, but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. Lord Chief Justice *Tindal* deals with the matter, as it appears to me, upon the supposition that the general maxim is that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements; he says (4), "It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is laid down by *Twisden* and *Wyndham*, JJ., in the case of *Palmer* v. *Fletcher* (1), 'that no man shall derogate from his own grant.' The same law was adhered to in the case of *Cox* v. *Matthews* (2), by Chief Justice *Holt* in *Rosewell* v. *Pryor* (3), and lastly, in the later case of *Compton* v. *Richards* (4). And in the present case, the sales to the Plaintiff and the Defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law." It appears to me, therefore, that this is a decision which fortifies the previous decision of Lord *Holt*.

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(1) 1 Lev. 122.
(2) 1 H. & N. 916.
(3) 9 Bing. 305.
(4) Ibid. 309.

I now come to *Pyer* v. *Carter* (5), which seems to break the hitherto unbroken current of authority upon this point, and there can be no doubt that Sir *Henry Jackson* is justified in saying that if that case is right this appeal ought to be allowed. That was a case of a somewhat special character. A house was conveyed to the Defendant by a person who was the owner of that house, and also of the house which was subsequently conveyed to the Plaintiff; and there had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the Defendant's premises over the Plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water when it came on to what were subsequently the Plaintiff's premises was conveyed into a drain on the Plaintiff's premises, which drain passed through the Defendant's premises, and in that way went out into the common sewer. Subsequently the house over which this easement existed was conveyed to the Plaintiff, and upon an obstruction of the drains in the Defendant's house, which, be it observed, immediately caused a flooding of the Plaintiff's house by the very water coming from the Defendant's house, the Plaintiff brought his action, and it was held there that the Plaintiff was entitled to maintain his action, and that upon the original conveyance to the Defendant there was a reservation to the grantor of the right to carry away this water which came from the Defendant's premises by the medium of the drain which also went through his premises. Though those circumstances were special in their character, there is no doubt that the principles laid down by the Court of Exchequer were as wide as possibly could be. That Court laid down that there was no distinction between implied reservation and implied grant; and this, as it appears to me, broke the hitherto unbroken current of authority upon this subject.

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(1) 1 Lev. 122.

(2) 1 Ventr. 237.

(3) 6 Mod. 116.

(4) 1 Price, 27.

(5) 1 H. & N. 916.

Now, although it is possible that the actual decision in *Pyer* v. *Carter* (1) was not exactly overruled, the principles there laid down were clearly and distinctly overruled by the same Court in *White* v. *Bass* (2); the facts of which case were these: A man was the owner of certain land and of a certain house which had windows through which the light, not as an easement but as a matter of enjoyment, had come for some time. He let the land (reserving the house) to trustees, subject to certain covenants by which they were to build in a particular manner upon the land, and if those covenants had been complied with, and they had built in the specific manner, there would have been no obstruction to the lights of the house which the grantor or the lessor reserved. Therefore, if we were entitled in these cases to go back to matters which existed before the time of the conveyance, we should have found here, as clearly as could be shewn, an intimation on the part of the lessor that if building was to be permitted on the adjoining land, it was only to be permitted under such conditions as would prevent the lights of the house being obstructed. But that being originally the position of matters it was followed by a conveyance of the reversion in the land to the trustees, and subsequently to that conveyance the house was conveyed to another person, and buildings having been put upon the land occupied by the trustees contrary to the terms of the original covenant, and of such a kind as obstructed the lights of the house, an action was brought by the person to whom the house was conveyed. In that action

(1) 1 H. & N. 916.

(2) 7 H. & N. 722.

it was decided that the Defendant held his land unfettered by the original covenant, and unfettered by any implied reservation, and that he was entitled to build in such a way as he thought proper on his land, although the effect of what he did might be to obstruct the lights of the Plaintiff. In giving judgment Lord Chief Baron *Pollock* says this (1): "My brother *Petersdorff* has cited no authority for the precise matter which he has urged before us, and I think that in construing a conveyance of land we must collect what the parties intended from the language they have used. It seems to me that we cannot look into the lease of the 2nd of October, 1855, for it is merged in the fee, a conveyance of the reversion having been made to the lessees, and we must look to that conveyance alone in order to ascertain the rights of the parties. In that conveyance there is no covenant by the purchasers not to build on the land so as to obstruct the light and air coming to the windows of the Plaintiff's house, nor indeed any limitation of the right to use the land." Now, no case can be more clear and distinct upon the point which we have to decide to-day, and the case is admitted by Sir *Henry Jackson* to be such, but he suggested that we ought to overrule it as being an exception to the general current of authority. So far from that being the case, *Pyer* v. *Carter* (2) appears to me to have been the exception, and not *White* v. *Bass* (3).

The latter case was followed by *Suffield* v. *Brown* (4). A good deal has been said about that case; and the principles upon which this Court ought to act in dealing with decisions of Courts of coordinate authority have been also discussed. I think I may say for myself (and I believe I am expressing the views of the other members of the Court) that we ought not to lay down as an absolute rule that decisions of Lord Chancellors, at all events sitting alone, are to be taken as decisions of the Court of Appeal, and absolutely binding on this Court so as to prevent us from even looking into the grounds or considering the case which was before the particular Lord Chancellor. But no doubt the greatest weight ought to be given to such decisions, and unless they are shewn to be manifestly wrong or manifestly contrary to the general current

(1) 7 H. & N. 730.
(2) 1 H. & N. 916.
(3) 7 H. & N. 722.
(4) 4 D. J. & S. 185.

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of authority on the point decided, it appears to me that we ought not to take upon ourselves to overrule them.

That being so, let us look a little more narrowly into that case. First, we have to see what was decided—and by that I do not mean what was absolutely necessary to be decided, but what really the Lord Chancellor took upon himself to decide, and, although he might have decided the case upon other grounds, put as his *ratio decidendi.* Upon that point there can be no doubt. We have only to read the close of his judgment to see that he put it entirely upon this principle, which I have stated as the second of the general rules applicable to cases of this kind, that a man cannot derogate from his own grant, and that as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee. The Lord Chancellor closes his judgment by saying (having dealt with some of the authorities as to continuous and apparent easements): "But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made." Although, therefore, it is perfectly true that, looking to the special circumstances of that case, it might have been decided upon those special circumstances so as even to admit the proposition for which Sir *Henry Jackson* contends, it is equally clear that the Lord Chancellor did not so decide the case, but decided it upon a distinct negative of that proposition. If we were to stop here, it seems to me that, looking to the fact that this was not a case in which this point in question was mooted for the first time, but that the point had been mooted and decided as early as the third year of the reign of Queen *Anne*, we should not be justified in doing anything but follow the principles enunciated by Lord *Westbury.*

But *Suffield* v. *Brown* (1) has been confirmed by an equally high authority, for in *Crossley & Sons* v. *Lightowler* (2) Lord *Chelmsford* as Lord Chancellor had to deal with a similar question, and he there says: "Lord *Westbury*, however, in the case of *Suffield* v. *Brown*, refused to accept the case of *Pyer* v. *Carter* (3) as an autho-

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(1) 4 D. J. & S. 185. 10 Jur N.S. 111 (2) Law Rep. 2 Ch. 478.

(3) 1 H. & N. 916.

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rity, and said, 'It seems to be more reasonable and just to hold that if the grantor intends to reserve any right over the property granted it is his duty to reserve it expressly in the grant rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation.' I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shews the contrary by expressly reserving it. The argument of the Defendants would make, in every case of this kind, an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity."

Now the only case in the Court of Appeal which is suggested as being contrary to this high authority of two Lord Chancellors, is *Watts* v. *Kelson* (1), and no doubt there are observations of Lord Justice *Mellish* to the effect that the order of conveyance in point of date is immaterial, that *Pyer* v. *Carter* (2) is good sense and good law, and that most of the Common Law Judges have not approved of Lord *Westbury's* observations. But, putting aside for the moment that this was a mere *dictum* of the Lord Justice during the argument, I must observe that this is not exactly so, as in *White* v. *Bass* (3) the Judges of the Court of Exchequer had distinctly, as regards the reasoning of *Pyer* v. *Carter*, overruled that case. No doubt, also, Lord Justice *James* says, "I am satisfied with the decision in *Pyer* v. *Carter*." But in the considered judgment of the Court, when if it had been intended to say that *Suffield* v. *Brown* (4) was not law, one would have thought there would have been something distinct upon the point, there is not one word to the effect of that which had been said by the Lords Justices during the argument. All that is said about it is this. Lord Justice *Mellish*, who delivered the judgment, after referring to *Nicholas* v. *Chamberlain* (5), said, "This case has always been cited with approval, and is identical not only in principle but in its actual facts with the case now before us. It was expressly approved of by Lord *Westbury* in *Suffield* v. *Brown* (1), where, though he objected to the decision in *Pyer* v. *Carter* (2), in which it was held that a right to an existent continuous apparent easement was impliedly reserved in the conveyance by the owner of two houses in the alleged servient houses, yet he seems to agree that the right to such an easement would pass by implied grant where the dominant tenement is conveyed first;" and that is what the Court of Appeal had to decide in *Watts* v. *Kelson* (3). Therefore *Watts* v. *Kelson* is no authority to justify us in overruling *Suffield* v. *Brown*, still less for overruling it, supported as it is by the case of *Crossley & Sons* v. *Lightowler* (4). Thus, then, as it appears to me, stand the principal authorities on the general rules of law which I stated at the commencement of this judgment.

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(1) Law Rep. 6 Ch. 166, 174.

(2) 1 H. & N. 916.

(3) 7 H. & N. 722.

(4) 4 D. J. & S. 185. 10 Jur N S

(5) Cro. Jac. 121.

Other cases which have been cited during the argument illustrate the exceptions to the second of those general rules. As I have already said, there is an undoubted exception in cases where the easement is what is called a way of necessity. Thus in *Pinnington* v. *Galland* (5), which was a case for disturbance of a right of way, there were five closes, two of them called the *Holme Closes*, which were separated by the others from the only available highway, and which were conveyed subsequently in point of time to the conveyance of the remaining closes through which this way *de facto* ran. In deciding that the way still existed, Baron *Martin* appears to me to have put the case entirely upon the exception to which I am referring. He says this: "Secondly, assume that the conveyance to Mr. *Dearle* was executed the first. In this case the *Rye Holme Closes* were for a short period of time the property of Mr. *Dickinson* after the property in the land conveyed to Mr. *Dearle* had passed out of him. There is no doubt apparently a greater difficulty in holding the right of way to exist in this case than in the other; but according to the same very great authority the law is the same, for the note (6) proceeds thus: 'So it is when he grants the land and reserves the close to himself;' and he cites several authorities which fully bear him out: *Clark* v. *Cogge* (7);

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(1) 4 D. J. & S. 185. 10 Jur. N.S. 111
(2) 1 H. & N. 916.
(3) Law Rep. 6 Ch. 166.
(4) Law Rep. 2 Ch. 478.
(5) 9 Ex. 1, 12.
(6) 1 Wms. Saund. 323, n.
(7) Cro. Jac. 170.

Staple v. *Heydon* (1); *Chichester* v. *Lethbridge* (2). It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton* v. *Taylor* (3), that it was for the public good, as otherwise the close surrounded would not be capable of cultivation." Now those last words clearly shew that the whole foundation of the judgment in the case of *Pinnington* v. *Galland* (4) was that the way claimed in the case was a way of necessity, and it is equally clear, as it seems to me, that Baron *Martin* and the Court whose judgment he delivered in no way disputed the general maxims to which I have referred. The case of *Davies* v. *Sear* (5) also appears to me to have been decided on the same basis. There a man, a builder, had got a lease of land for the purpose of building upon that land, and he proposed to build upon it in such a way as that through an archway, which was, at all events, standing to such an extent as to shew that it was intended to be used for a passage—that through that archway should be the only means of communication with certain stables which were to be erected. That being the position of things, a portion of the land was sold to a third person, and the question arose whether it was open to that person to build upon his land in such a way as to obstruct this one only way into the stable. The Master of the Rolls (Lord *Romilly*) held that it was not. And why? He founded his opinion upon the basis of this exception to which I am referring. He says: "The question is, whether the Defendant has a right to shut up the archway, and to intercept all access to *Erskine Mews* through this passage. This depends upon whether this easement is reserved by implication on the assignment of the house to the Defendant; and this depends upon whether the easement is apparent, and also is a way of necessity."

These cases in no way support the proposition for which the Appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land.

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(1) 6 Mod. 1.

(2) Willes, 72, n.

(3) Lutw. 1487.

(4) 9 Ex. 1, 12.

(5) Law Rep. 7 Eq. 427, 431.

Upon the question whether there is any other exception, I must refer both to *Pyer* v. *Carter* (1) and to *Richards* v. *Rose* (2); and, although it is quite unnecessary for us to decide the point, it seems to me that there is a possible way in which these cases can be supported without in any way departing from the general maxims upon which we base our judgment in this case. I have already pointed to the special circumstances in *Pyer* v. *Carter*, and I cannot see that there is anything unreasonable in supposing that in such a case, where the Defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer* v. *Carter* is right or wrong comes for discussion, to consider that point. *Richards* v. *Rose*, although not identically open to exactly the same reasoning as would apply to *Pyer* v. *Carter*, still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other. Is there anything unreasonable—is there not, on the contrary, something very reasonable—to suppose in that case that the man who takes a grant of the house first and takes it with the right of support from that adjoining house, should also give to that adjoining house a reciprocal right of support from his own?

One other point remains, and that I shall dispose of in a very few words. It is said that, even supposing the maxims which I have stated to be correct, this case is an exception which comes within the rule laid down in *Swansborough* v. *Coventry* (3) and

16 Ch. D. 359

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(1) 1 H. & N. 916. (2) 9 Ex. 218. (3) 9 Bing. 305.

Compton v. *Richards* (1), namely, that, although the land and houses were not in fact conveyed at the same time, they were conveyances made as part and parcel of one intended sale by auction. It seems to me that that proposition cannot be supported for one moment. We start here with an absolute conveyance in January, 1876. What right have we to look back to any previous contract or to any previous arrangement between the parties? If it had been the case of an ordinary contract, and there had been parol negotiations, it is well-established law that you cannot look to those parol negotiations in order to put any construction upon the document which the parties entered into for the purpose of avoiding any dispute as to what might be their intentions in the bargain made between them. The same rule of law applies, and even more strongly in the case of a conveyance, which alone must regulate the rights of the parties. In the cases which have been cited the conveyances were founded upon transactions which in Equity were equivalent to conveyances between the parties at the time when the transactions were entered into, and those transactions were entered into at the same moment of time and as part and parcel of one transaction. There may be, and there is, according to *Swansborough* v. *Coventry* (2), another exception to the rule which I have mentioned; but here the sale by auction was abortive as regards the Defendant's property. There was a conveyance in January of the Plaintiff's property without any reservation, and there was no contract of purchase on the part of the Defendant until more than a month after that conveyance had been complete. I believe I am expressing the view of the other members of the Court when I say that it appears to the Court that under such circumstances there is no exception to the general rule. For these reasons, therefore, the appeal should be dismissed.

JAMES, L.J.:—

The Lord Justice has been kind enough to express the judgment of the Court. I only want to say something in addition, that in the case of *Nicholas* v. *Chamberlain* (3) the Court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran

(1) 1 Price, 27. (2) 9 Bing. 305. (3) Cro. Jac. 121.

was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house. The appeal is dismissed with costs.

BAGGALLAY, L.J., concurred.

Solicitors for the Plaintiff: *Aldridge, Thorn, & Morris*, agents for *John Smith, Derby.*

Solicitors for the Defendant: *E. Warriner*, agent for *W. B. Hextall, Derby.*

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June 17, 20.

Appeal from Court of County Palatine of Lancaster—Rules of Court, 1875, *Order* LVIII., *r.* 15—*Retainer by Executor—Judicature Act*, 1875, *s.* 10.

16 ChD 340
18 ChD 372
374-6
20 ChD 540
550
9 QBD 656

Order LVIII. of the Rules of Court, 1875, applies to appeals from the Court of the County Palatine of *Lancaster* as well as to appeals from the High Court of Justice, and the time for appealing is now regulated by rule 15 of that Order, and is no longer governed by the General Orders of 1855 regulating appeals from the Court of the County Palatine.

An executor's right to retain a debt due to himself does not make him a secured creditor within the meaning of the *Judicature Act*, 1875, s. 10, and his right to retain is not affected by that section.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine of *Lancaster.*

A decree was made on the 16th of November, 1876, in the Chancery of the County Palatine, at the suit of a creditor, for the administration of the estate of *John Neville.* In the same month an order was applied for that *Ellis Nuttall*, one of the executors, might pay into Court a balance of personal estate in his hands. He claimed to retain out of it a sum of £868 6*s.* 7*d.* due from the testator to him, and an order was made for him to pay in the balance, less that sum, but the question whether he would ultimately be entitled to retain was not formally decided, and the costs of the motion were reserved. On the 14th of March, 1878, the Registrar made his report, allowing the right of retainer, and finding the balance due from the executor on that footing.

On the 27th of July, 1878, the cause came on for further directions, along with a motion by the Plaintiff to vary the report so far as regarded the retainer of the £868 6*s.* 7*d.*

At the hearing for further directions evidence was admitted to prove that since the date of the report *Ellis Nuttall* had paid £441 8*s.* 9*d.*, the amount due upon a bill of exchange accepted by the testator and by *E. Nuttall* and another as his sureties.

The Court refused the motion to vary the certificate, thus affirming the right of retainer as to the £868 6*s.* 7*d.*, and by the order on further directions ordered that *Nuttall* should be at liberty to retain the £441 8*s.* 9*d.* out of any assets in his hands; or, in case the assets in his hands should be insufficient to make up such amount, then that he should be paid the deficiency out of the sums which had been paid by him into Court.

On the 13th of December, 1878, the Plaintiff served notice of appeal, asking that the order of the 27th of July, 1878, might be varied so far as it refused the Plaintiff's motion to vary the report, and so far as it directed *Nuttall* to retain the £441 8*s.* 9*d.*; and that the report might be varied by disallowing the right to retain the £868 16*s.* 7*d.*

The appeal came on for hearing on the 17th of June, 1879.

Robinson, Q.C., and *S. Hall*, for the Appellant:—

As regards the £868 6*s.* 7*d.*, the question arises whether the appeal is in time. We contend that it is, on the ground that the rules as to time under the *Judicature Act* do not apply to appeals from the County Palatine: *In re Commission, Sale, and Sample Room Company* (1). The 18th section of the *Judicature Act*, 1873, sub-s. 2, is the only provision in that Act referring to the County Palatine, and does not affect appeals, which, as we contend, are left to be regulated by the General Orders of 1855 relating to the Court of the County Palatine. Those Orders allow six months for the appeal.

North, Q.C., and *E. S. Ford*, for *Nuttall*:—

Under the old practice an appeal from a decision of the Court of the County Palatine on an order made on further directions was by petition, so if the old practice still prevails the Appellant is wrong in coming here on motion, and he is now too late to present a petition. But we contend that all appeals to the Court of Appeal are regulated by the Rules of Court, 1875, which are perfectly general.

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(1) 21 Sol. J. 46.

Bagshawe, Q.C., and *Clare*, for the co-executor, who was a co-security for the debt:—

If the contention of the Appellants is right, here will be a curious anomaly, that the time for appealing from an interlocutory order of the Court of the County Palatine is longer than from an order of the High Court, and that from a final order is shorter.

Robinson, in reply:—

The Court of the County Palatine is not a branch of the High Court, and it was not intended by the *Judicature Act* to interfere with appeals from it. The general terms of Order LVIII. must be taken in connection with the power to make rules given by the Act of 1873, sect. 23.

[JAMES, L.J.:—How is the general effect given to the rules by the Act of 1875, sect. 16, to be cut down?]

The Court will allow further time if there has been a mistake.

JAMES, L.J.:—

If there had been a mere slip of form, we should have been disposed to grant indulgence; but the point, though not adjudicated upon in a binding way, was discussed so far back as November, 1876, and we think that if the Appellant is out of time further time ought not to be allowed. We are inclined to the view that the General Orders apply to appeals from the County Palatine, and that the appeal as to the £868 is therefore too late, but we will consider our decision on that point. In the meantime, as the appeal clearly is in time as regards the £441, we will hear the case on the merits.

Robinson, Q.C., and *S. Hall*, for the Appellant:—

There is no doubt that under the old law the executor had the

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right of retainer which he claims: *Nunn* v. *Barlow* (1); but we contend that this right is taken away by the *Judicature Act*, 1875, s. 10. The right of the executor is wrongly called retainer; he is, in fact, a secured creditor: *Talbot* v. *Frere* (2). It depends upon an executor's right of giving preference to a creditor.

[JAMES, L.J.:—I think it does not. If it did it would be taken away by a decree for administration, since after a decree an executor cannot prefer one creditor to another.]

The case comes within the words of the section, the application of which is shewn by *In re Printing and Numerical Registering Company* (3).

[JAMES, L.J.:—What have we to do with the rights of secured and unsecured creditors?]

An executor with a right of retainer is a secured creditor.

[JAMES, L.J.:—If he were he could retain against a debt of superior degree.]

The Master of the Rolls, in *Talbot* v. *Frere*, treated the case as one of security.

[JAMES, L.J.:—Has the question of retainer ever arisen where the debt did not become a debt till after the testator's death?

North, Q.C.:—*Boyd* v. *Brooks* (4), affirmed on appeal, decides the point.]

The Respondents were not called upon.

JAMES, L.J.:—

Under the law as it stood before the *Judicature Act* of 1875, an executor had a right to retain a debt due to himself as against all creditors of equal degree out of all moneys coming to his hands, and this right was not lost by his paying them into Court. I am of opinion that this right is not affected by the *Judicature Act*, 1875, s. 10, relating to secured and unsecured creditors. The Legislature never intended to treat an executor having a right of retainer as a secured creditor; if his right to retain was in the

(1) 1 S. & S. 588.
(2) 9 Ch. D. 568.
(3) 8 Ch. D. 535.
(4) 34 Beav. 7.

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nature of a security, he would have it as against creditors of a higher degree, and could retain as against everybody. The sole object of the section, as it appears to me, was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realize his security afterwards, and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realizing or valuing his security. The section was never intended to apply to retainer by an executor.

BAGGALLAY, L.J.:—

I am of the same opinion. I cannot see how an executor's right of retainer can be considered a security.

THESIGER, L.J.:—

I am of the same opinion.

June 20. The judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.), on the question of practice, was delivered by

BAGGALLAY, L.J.:—

18 Ch D 374

This was an appeal from a decision of the Vice-Chancellor of the County Palatine of *Lancaster*. A preliminary question was raised whether, in respect of a portion of the subject-matter of the appeal, the Appellant was not out of time, and this gave rise to the further question, whether the rules contained in the first schedule to the *Judicature Act* of 1875, which limited the times within which appeals are to be brought to the Court of Appeal, established by the Judicature Acts, are applicable to appeals from orders made by the Vice-Chancellor of the County Palatine.

In the result the appeal was dismissed upon its merits, but the question whether it was not out of time having been very fully discussed, we have thought it right to express a considered opinion upon it.

By the 16th section of the statute 13 & 14 Vict. c. 43, intituled "An Act to amend the practice and proceedings of the Court of Chancery of the County Palatine of *Lancaster*," it was provided that no appeal from any decree or order of the Vice-Chancellor should be presented but within six calendar months of making the same, unless the Chancellor of the Duchy, upon special application made to him, should otherwise direct. At the time of the passing of that statute, and thenceforward until the passing of the statute next mentioned, the jurisdiction in matters of appeal from the Court of Chancery of the County Palatine was exercised by the Chancellor of the Duchy and County Palatine, sitting with two Judges of assize, but the exercise of such jurisdiction was attended with much expense and inconvenience, and accordingly it was provided by the statute 17 & 18 Vict. c. 82, that the Chancellor of the Duchy and County Palatine and the two Lords Justices of the Court of Appeal in Chancery should form the Court of Appeal in Chancery of the County Palatine, and that all the jurisdiction of the Court of Appeal so constituted might be exercised either by one only of the Lords Justices and the Chancellor of the Duchy sitting together, or by both the Lords Justices sitting apart from the Chancellor, with a proviso that the Chancellor might, while sitting alone, exercise the like jurisdiction, powers, and authorities as might have been exercised by him sitting alone if the now stating Act had not been passed. Such was the constitution of the Court of Appeal in Chancery of the County Palatine, and such the mode of exercising its jurisdiction, at the time of the passing of the Judicature Acts, and accordingly, down to the time of those Acts coming into operation, any appeal from an order of the Vice-Chancellor of the County Palatine, whether interlocutory or final, was required to be brought within six months from the date of the order.

By the 18th section of the *Judicature Act* of 1873 there were transferred to and vested in the Court of Appeal thereby established all jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery and of the same Court as a Court of Appeal in Bankruptcy, and also the jurisdictions and powers of divers other Courts, including "all jurisdiction and powers of the Court of Appeal in Chancery of the County Palatine of *Lancaster*, and all jurisdiction and powers of the Chancellor of the Duchy and County Palatine of *Lancaster* when sitting alone or apart from the Lords Justices of Appeal in Chancery."

By the 23rd section of the same Act it was provided that the jurisdiction transferred by the Act to the Court of Appeal should be exercised (so far as regards procedure and practice) in the manner provided by the Act or by such rules and orders of Court as might be made pursuant to the Act, and that where no special provisions were contained in the Act, or in any such rules or orders of Court with reference thereto, it should be exercised as nearly as might be in the same manner as it might have been exercised by the respective Courts from which such jurisdiction should have been transferred.

The question therefore for present consideration is whether any such provision is made in respect of appeals from the Vice-Chancellor of the County Palatine; for, if not, the previous practice in respect of such appeals must still be observed.

Sections 69 to 74, inclusive, of the Act of 1873 contained a variety of provisions as to the rules and orders of Court which were thenceforth to be in force, but these sections were all repealed by the Act of 1875, which by its 16th section provided that the rules of Court in the first schedule to that Act should, as to all matters to which they extend, thenceforth regulate the proceedings in the High Court of Justice and the Court of Appeal respectively, but that such rules might be varied in manner provided by the same and other sections of the Act.

The rules relating to appeals are included in the 58th of the Orders set forth in the first schedule to the Act. The 1st and 2nd of these rules provide that bills of exceptions and proceedings in error shall thenceforth be abolished, and that all appeals to the Court of Appeal shall be by way of rehearing, and then follow a series of rules providing for the procedure in respect of such appeals, that is, of all appeals the jurisdiction in respect of which was transferred to the Court of Appeal.

And the 15th rule, which limits the time within which appeals are to be brought, is equally general in its terms.

We are clearly of opinion that it was the intention of the Legislature, in passing the Judicature Acts, that, with the exceptions specially provided for, there should be a uniformity, not only as regards the mode in which appeals should be prosecuted, viz., by way of rehearing, but also as regards the times within which they should be brought, and that the 15th rule of Order LVIII. is consequently applicable to an appeal from an order of the Vice-Chancellor of the County Palatine of *Lancaster*.

Solicitors: *E. Doyle & Sons; Pritchard, Englefield, & Co.; F. Parker.*

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SHERWIN *v.* SELKIRK.

[1874 S. 347.]

Statute—Construction—Judicature Act, 1873, *s.* 25, *sub-s.* 1—*Supreme Court Commencement Act*, 1874, *s.* 2—*Judicature Act*, 1875, *s.* 10—*Administration of Assets—Secured Creditor—Rule in Bankruptcy.*

The 1st sub-section of the 25th section of the *Judicature Act*, 1873, was not directed to take effect at the passing of the Act, and therefore was suspended by the *Supreme Court Commencement Act*, 1874, until the 1st of November, 1875.

Consequently, the estate of a person who died in April, 1874, and for the administration of which a suit was commenced in December, 1874, was to be administered according to the old rule of the Court of Chancery respecting secured creditors, and not according to the rule of the Court of Bankruptcy.

Decision of *Malins*, V.C., reversed.

Hilton v. *Jones* (1) overruled.

THIS was an appeal from a decision of Vice-Chancellor *Malins*, on the further consideration of a suit instituted for the administration of the real and personal estate of *W. Selkirk*, who died intestate in April, 1874.

The bill was filed in December, 1874, and a decree for administration of the estate was made on the 16th of January, 1875.

By the Chief Clerk's certificate it appeared that the *Bank of Whitehaven* were mortgagees of the real estate of the intestate for a debt and interest amounting to £2855, and that there were several unsecured creditors. The estate was insufficient to pay the whole of the creditors in full. The value of the property comprised in the mortgage was about £1010. On the 8th of November, 1875, the cause came on for further consideration, when the Vice-Chancellor ordered that the residue should be distributed proportionally among the creditors other than the *Bank of Whitehaven*, unless the bank should bring in their security or the value thereof, in which case the bank was to have a share in the distribution.

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(1) 9 Ch. D. 620.

The *Bank of Whitehaven*, who had obtained leave to appear, opposed the declaration respecting their debt, and claimed to come in with the other creditors without bringing in their security, according to the old practice in the Court of Chancery; but the Vice-Chancellor, following his own decision in *Hilton* v. *Jones* (1), held that the 1st sub-section of the 25th section of the *Judicature Act*, 1873, was in force at the time of the death of the intestate and of the decree in the suit, and that it was applicable to the distribution of the estate. He therefore made the order as stated.

From that part of the order the *Bank of Whitehaven* appealed.

J. Pearson, Q.C., and *Cozens-Hardy* (*Whitworth* with them), for the Appellants :—

The 25th section of the *Judicature Act*, 1873, sub-s. 1, enacts that, "In the administration by the Court of the assets of any person who may die after the passing of this Act" the rule of Bankruptcy as to secured creditors is to apply. That Act was passed on the 5th of August, 1873, but was not to commence till the 2nd of November, 1874. Then the suspending Act of 1874, which was passed on the 7th of August, 1874, enacted that "the *Supreme Court of Judicature Act*, 1873, except the provisions thereof directed to take effect on the passing of the said Act, shall commence and come into operation on the 1st of November, 1875." The 1st sub-section of the 25th section of the *Judicature Act*, 1873, was not one of the provisions referred to, for there is no allusion in it to the passing of the Act, except the declaration that it is only to apply to the administration of estates of persons dying after the passing of the Act. That is only a description of the persons to whom the enactment is applicable, and has nothing to do with the period at which the section is to come into operation. Besides, the Court spoken of in the clause is the Supreme Court of Judicature, which did not come into existence till the 1st of November, 1875. Therefore, at the time when the intestate died this sub-section had no operation, and his estate must be adminis-

(1) 9 Ch. D. 620.

tered according to the law as it existed before the *Judicature Act* was passed: *In re Joseph Suche & Co.* (1); *Noble* v. *Edwardes* (2).

Higgins, Q.C., and *T. A. Roberts*, for the Plaintiff:—

The very case supposed by the first sub-section of sect. 25 has happened: the intestate did die after the passing of the Act, and the estate is being administered by the Court. The use of the words, "at the passing of the Act," shews that the intention of the Legislature was that particular provisions were to take effect on the passing of the Act. Otherwise the words, "the commencement of the Act," which is the usual expression throughout the Act, would have been used. Therefore this is one of the sections which was excepted by the Suspending Act of 1874, and it remained in force till it was repealed and re-enacted by sect. 10 of the *Judicature Act*, 1875.

The expression, "administration by the Court," does not necessarily refer to the Supreme Court of Judicature, but means the Court which for the time being has the power of administering the assets of the deceased person. It is opposed to an administration by an executor or administrator out of Court.

Locock Webb, Q.C., *Jolliffe*, and *Howard*, for other parties.

JAMES, L.J.:—

It really seems to me that the case would be beyond all reasonable doubt were it not for the expression of opinion given by Vice-Chancellor *Malins* in the case of *Hilton* v. *Jones* (3), which I observe, from the note to the report, was brought up for appeal, but the point was not decided, because the facts rendered it unnecessary to do so. The ground upon which Vice-Chancellor *Malins* put it in that case, was some sort of equitable construction of the Act. He says: "The Suspending Act of 1874, in postponing the operation of the Act of 1873, excepted any provision directed to take effect upon the passing of the Act, and I must hold that this 25th section being a provision substantially directed

(1) 1 Ch. D. 48.

(2) 5 Ch. D. 378.

(3) 9 Ch. D. 620, 622.

to take effect upon the passing of the Act, was not suspended by the Act of 1874." Now I am bound to say that I really do not understand what is meant by a provision being "substantially directed." It is either directed to take effect, or it is not directed to take effect, upon the passing of the Act. What the section says, is that certain rules "shall be applied with respect to persons dying after the passing of the Act." Those words, "after the passing of the Act," are a description of the persons as to whom, when the Act begins, it is to be applied, but they have nothing to do with the taking effect of the Act. The section says that the Court—which, I have no doubt, meant the Court intended to be thereby constituted, that is to say the High Court of Justice—was in the administration of estates to have regard and to give effect to certain rules, but not to do it except with regard to persons who died after the passing of the Act. Until the Court came into existence it could not do anything, and the thing which was directed to be done by the Court could not take effect. And therefore it is impossible, in my view, upon any principle to say that that thing was directed substantially, or in any way whatever, to take effect upon the passing of the Act. It was one of the clauses which was suspended by the Act of 1874 until the Act of 1875, and then, before it came into effect at all, it was repealed by a new section, which in terms says it is to be applied to the estates of persons dying after that Act. It is not necessary to go further into the very long series of observations which were addressed to us upon all the different parts of the Act of Parliament. The thing seems too plain.

BAGGALLAY, L.J.:—

I am of the same opinion. The question we have to consider is, whether the rule of law declared in the first sub-section of sect. 25 of the *Judicature Act* of 1873 is to be observed in the administration of the estate of one *William Selkirk*, who died in April, 1874, after the passing of that Act, and in respect of whose estate an administration order was made in the month of December of the same year.

The rule of law so declared was to the effect that, "In the administration by the Court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt." The first and the most important question is, what is meant by the expression, "In the administration by the Court," in other words, what is meant by the words "the Court." There is no interpretation clause, and we must therefore look to the context. Now, turning to the context, we first of all find that the title of the Act is, "An Act for the Constitution of a Supreme Court." Then the preamble states "it is expedient to constitute a Supreme Court," and the enacting parts of the Act are divided into several parts. The first is as to the "constitution and Judges of Supreme Court;" the second as to the "jurisdiction and law;" the third to "sittings and distribution of business," and so on through seven parts; but all having reference to the jurisdiction and the mode in which the business is to be conducted in the Supreme Court, which it was the object of the Act to establish, and I may notice that sect. 3 provides how the Supreme Court is to be constituted by the union or amalgamation of a large number of existing Courts, and sect. 4 provides that "the said Supreme Court shall consist of two permanent divisions, one of original, and the other of appellate jurisdiction." When we come to Part II., in which sect. 25 occurs, we find that from the 16th to the 23rd sections inclusive they all have reference to the jurisdiction which is one of the subject matters mentioned in the heading of the part, and the 24th and 25th have reference to the rules of law or rules of practice thenceforth to be observed. The 24th section is introduced by these words, "In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively, according to the rules following," then you have a variety of rules for the purpose of doing away with the anomalies which at the time existed between the modes of practice in the different

Courts which were amalgamated for the purpose of forming the Supreme Court. The 25th section is introduced by these words: "And whereas it is expedient to take occasion of the union of the several Courts, whose jurisdiction is hereby transferred to the said High Court of Justice, to amend and declare the law to be hereafter administered in *England*, as to the matters next hereinafter mentioned." Then it proceeds to enact under eleven different heads the law which is thenceforth to be observed with regard to those several matters; as regards nine of those heads, it may be stated, in general terms, that they give the effect of law to the rules previously observed by Courts of Equity; but, with respect to the first head, with which we have at present to deal, the rules previously observed in bankruptcy are to prevail over those previously observed in Chancery; and, with respect to the ninth, which deals with damages in cases of collision between two vessels, where both are in fault, the Admiralty rule is to prevail over the rule previously observed at Common Law. These are rules of the Court constituted by the Act of Parliament, and in the two Divisions in which the Court is to act.

I can come to no other conclusion, having regard to the frame of the Act and the context, that where reference is made in subsect. 1 of sect. 25, to "administration by the Court," it can mean no other Court than the Court which is constituted by, and which is to come into operation and to have effect under, the Act of Parliament. When you have once arrived at that conclusion, it seems to me that you have substantially disposed of the question which we have now to deal with, because the 2nd section of the Act of 1873 provides, that "This Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation on the 2nd day of November, 1874." A short Act was passed in 1874, and the time for the commencement of the Act of 1873 was extended until the 1st of November, 1875. There is no declaration whatever in the Act of 1873 that section 25, or any sub-section of it, is to take effect on the passing of the Act. No doubt it does provide that when an administration takes place by the Court, whenever that system of administration may commence, that in that case it shall have reference to the estates of persons who die after the passing of

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the Act. There is nothing further to indicate an intention, certainly not a declaration, that that provision or sub-section of the Act is to come into operation earlier than when there shall be an administration by the Court constituted by the Act of Parliament. If that be so, the operation of this section of the Act of Parliament is postponed until the 1st of November, 1875. If it had not been so postponed, no doubt in the case of an administration by the Court, if it had been constituted at an earlier period, the rule would have applied, but the constitution of the Court does not take place, and the provisions for its constitution do not come into effect, until the 1st of November, 1875, and that very day on which it came into operation the Act of 1875 also came into operation, and repealed the whole provision.

THESIGER, L.J. :—

I am entirely of the same opinion. I must say that when the different sections of the Act of 1873 are compared the matter is really free from all doubt whatever. The 2nd section provides that "This Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation on the 2nd of November, 1874," that period being extended by a subsequent Act of 1874 until the 2nd of November, 1875, when also the Act of 1875 came into operation. Now I may observe that whenever the draftsman of this Act intends to make it clear that a provision shall take effect on the passing of the Act he is able to do it as one would expect he would do it, in clear and intelligible terms, because at the close of sect. 60 it is said, "This section shall come into operation immediately upon the passing of this Act." Again, at the close of the 68th section, "This section shall come into operation immediately on the passing of this Act." There, therefore, are two sections in which the declaration which is referred to in the 2nd section of the Act is made in clear, precise, and intelligible terms.

Now, turning to sect. 25, let us see whether the preamble throws any light upon the intention of the Legislature as regards the subsection. It is, "And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in *England* as to the matters next hereinafter mentioned." Now, what is the occasion? The occasion is not the passing of the Act by which the Courts are to be united, but the union of the Courts—the time when the Courts are to be united. Therefore, pausing at this point, nothing can be clearer from the preamble than this, that the amendment of the law was to be an amendment which was to be administered by the new Court, and which was to take effect when the new Court, amalgamating the old ones, came into operation. Let us for a moment turn away from sub-sect. 1. There are eleven sub-sections covered by this preamble to which I have referred, nine of those sub-sections do not mention even incidentally the passing of this Act, and therefore it must be admitted that as regards those sub-sections the period at which the alteration in the law or practice is made is the period when the Act comes into operation, and more than that, when we look at sect. 91, which is to apply to all Superior Courts in the kingdom, the rules of law which are comprised in the 11th sub-section of sect. 25, it is clear that those rules are only to come into operation as regards those Courts, although no alteration is to be made in them at the time when the Act comes into operation. The words are, "The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in *England*, so far as the matters to which such rules relate shall be respectively cognizable by such Courts." There is clearly, neither directly nor indirectly, any direction in that section that any time but that of the Act coming into operation shall be the time when the rules of law in sect. 25 are to come into operation in Courts of Justice.

We come then to the consideration of sub-sect. 1 with the strongest ground for believing that the intention of the Legislature, as expressed in the Act itself, was that these changes in the rules of law should only come into operation when the existence of the Court, the existence of which was to be the occasion of this change, was a fact. Even if that were not so, the words of sub-sect. 1 are so clear that I cannot conceive how there can be any doubt upon the matter. "In the administration by the Court of the assets of any person." Now stopping there, can there be any doubt as to the time when so far the section would come into

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operation? Clearly no doubt whatever. Then how does it go on? "The assets of any person who may die after the passing of this Act." How is that in any way to affect the time when the section is to come into operation? It is nothing more nor less than a description of the person whose estate is to be administered, the administration to take effect and to operate at the time when this Act comes into operation. Therefore it appears to me that however you were to read the words, "the Court," whether you were to read it as an existing Court or as the new Court, equally the time when the sub-section would operate would be the time of the commencement of the Act. At the same time I think the matter is made more clear and is more pointed by the fact that clearly in the administration by the Court the word "Court" there refers, not to the existing Court, but to the High Court of Justice, which is made out of it. For these reasons it appears to me that the appeal should be allowed.

JAMES, L.J.:—

The appeal will be allowed with costs both here and in the Court below.

I may mention that in *Noble* v. *Edwardes* (1) the Court decided substantially the same thing as to sub-sect. 7.

Solicitors: *Helder, Roberts, & Co.; Peacock & Goddard; Johnston & Harrison.*

(1) 5 Ch. D. 378.

In re GOLD COMPANY.

C. A.
1879
FRY, J.
May 23.
C. A.
June 25.

14 ChD 247
15 ChD 141
19 ChD 118
120
20 ChD 577

Companies Act, 1862, s. 115—*Power to summon Persons whom the Court may deem capable of giving Information.*

Where a Judge has under the *Companies Act*, 1862, s. 115, ordered persons to be summoned for examination on the ground that he deems them capable of giving information concerning the trade dealings, estate, or effects of the company, the Court of Appeal will not interfere with his discretion unless in an extreme case.

Semble, that a person so summoned to be examined has no *locus standi* to appeal against the order directing him to attend for examination.

THIS was an application by a contributory under sect. 138 of the *Companies Act*, 1862, asking, among other things, that—for the purpose of determining under sect. 165 whether any past or present director, manager, or officer of the *Gold Company*, or *James Fraser*, the late secretary and now liquidator thereof, was or had become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company or otherwise, or in particular was or had become liable or accountable in respect of the manner in which the shares of the company or any part thereof had been allotted or dealt with—all or any of the powers which the Court might exercise if the company were being wound up by the Court, might be exercised under the direction of the Judge, and the conduct of the past or present directors, manager, and officers of the company, and of the liquidator, inquired into and examined; and that for that purpose all necessary directions might be given by the Judge, and all necessary persons summoned before him; and that the applicant might be at liberty to summon by summons in the usual form, under the directions of the Judge, any person or persons for examination before the examiner of the Court or a special examiner; and that the applicant might be permitted to conduct such examination, and to require the production of all necessary books, papers, deeds, writings, or other documents in the custody or power of such person or persons and relating to the company.

The company was incorporated as a limited company on the

26th of November, 1873, with a capital of £100,000 in £1 shares. The 11th clause of the articles of association was as follows:—

> "If at any time it shall appear to the directors that the capital of the company for the time being subscribed will be sufficient for the purposes of the company, they may allot any shares which then remain unallotted to and among the then shareholders in proportion to the number of shares respectively held by them, and such shares may be so allotted as fully or partially paid up shares, although no moneys may be received by the company in respect of such shares from any allottee thereof."

By an agreement dated the 31st of December, 1873, and registered on the 7th of January, 1874, expressed to be made between the company of the first part, the persons named in the first schedule of the second part, and the persons named in the second schedule of the third part, reciting that the persons named in the second schedule were the only existing shareholders, and that the parties of the second part had advanced to or for the benefit of the company the sums of money set against their respective names in the first schedule, and that all the said moneys had been properly expended upon the property or otherwise for the legitimate purposes of the company, and that the parties of the second part had respectively agreed to accept as fully paid-up shares the shares set against their names in the same schedule in lieu of any claims they might respectively have in respect of the said moneys, —it was agreed that, in consideration of the said advances and expenditure, the shares mentioned in the first schedule should be allotted to the persons against whose names they were respectively set, and that the same should be allotted and issued as fully paid-up shares, and that no payments should be required from any allottee of any of such shares in respect of the share or shares to be allotted to him as aforesaid.

The existing shareholders mentioned in the second schedule were twenty-one, holding 2375 shares. The persons named in the first schedule were thirty-two. The sums mentioned in the first schedule as having been advanced by the proposed allottees amounted to £18,775, and the shares allotted to them were 18,775.

Carter, the present applicant, bought shares in the market in June, 1875, and was the holder of them at the time of the winding-up.

On the 9th of May, 1877, a resolution was passed for the voluntary winding-up of the company. *James Fraser*, the former secretary, was appointed liquidator. *Carter*, in February, 1878, presented a petition for a compulsory winding-up, and Vice-Chancellor *Malins* made an order accordingly; but this order was discharged by the Court of Appeal on the 20th of January, 1879.

Carter then gave notice of motion to the effect hereinbefore stated, which was served on the liquidator and the company.

The motion was heard before Mr. Justice *Fry* on the 23rd of May, 1879.

Higgins, Q.C., and *Oswald*, for the motion.

J. Pearson, Q.C., and *H. C. Deane*, for the liquidator.

FRY, J.:—

This is an application to me under the 138th section. That section provides that where a company is being wound up voluntarily any contributory may apply to the Court to determine any question arising in the matter of such winding-up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court, and the Court in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede wholly or partially to such application, on such terms and subject to such conditions as the Court thinks fit. Now, the power I am asked to exercise is that given by the 115th section, which gives me power to summon before the Court any officer of the company, or any person supposed to be capable of giving information concerning the transactions and the trade dealings of the company. There has been brought to my attention the agreement of the 31st of December, 1873, under which certain shares are allotted upon the footing of a recital that moneys amounting to

£18,775 had been properly expended upon the property or otherwise for the legitimate purposes of the company. There is before me in the affidavits, in the articles of association of the company, and in the books of the company, evidence about which I desire to say as little as possible; but I only say it satisfies me that there is a question that I think ought fairly and reasonably to be inquired into with regard to the truth of that recital in the instrument, and with regard to the propriety of the allotment of shares made on the footing of the recital. Beyond that, I do not desire to express the impression produced on my mind by the evidence, because I am now merely permitting a step to be taken for the further investigation of that question. It appears to me in this case that it would be just and beneficial, therefore, that I should exercise the power. In coming to the conclusion I do, it is right to bear in mind that I shall have full control over the costs of this application. Of course Mr. *Higgins* does not object to submit, if necessary, that the costs shall be dealt with in such manner as the Court may think fit. I presume that I have the power of doing that, but if not I should require that submission to be given. That being acceded to, I take the submission of the applicant that the costs should be dealt with in such manner as the Court shall think fit. It will therefore follow that if this application is unsuccessful in its result, there will be no serious injury to the company. I am not stopping the winding-up, and I shall not be increasing, or certainly not to any material extent, the costs of the liquidation. On the other hand, if the applicant should succeed in the contention he has raised, it may result in an increase to the assets of the company. Weighing the whole case, therefore, I think it is just and beneficial that I should exercise that power, reserving the whole of the other matters dealt with by this summons until after the information has been obtained from these gentlemen.

An order was accordingly made that *Carter* should be at liberty to examine the persons mentioned in the schedule to the order, or any or either of them, before the examiner of the Court, touching the alleged misfeasance of the said persons, or any or either of them, as directors or officers of the said company, in improperly allowing, as moneys properly expended for the benefit or purposes of the company, all or any of the sums of money mentioned in the first schedule to the contract dated the 31st of December, 1873, under which the 18,775 shares were allotted, or in improperly allotting all or any of the shares mentioned in the said schedule.

The persons named in the schedule were *Fraser*, the liquidator (who, as stated above, had been the secretary of the company), and *Wilson*, *Attenborough*, *Staples*, and *Fraser*, four of the directors.

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The company, *Fraser*, *Attenborough*, and *Wilson*, gave notice of appeal. The appeal was heard on the 25th of June.

J. Pearson, Q.C., *Bristowe*, Q.C., and *H. C. Deane*, for the Appellants:—

The applicant does not ask to set aside the deed under which the shares were allotted, and yet he is seeking to examine whether the shares were properly allotted under it. He is bound by the deed, for he takes his shares under persons who were parties to it, and the examination must be useless.

[JESSEL, M.R.:—Can the witness apply to discharge an order for his examination? It is usually made behind his back on a *primâ facie* case.]

We submit that he may: *Clement's Case* (1).

[JESSEL, M.R.:—The point does not appear to have been taken.]

A witness ought to have power to apply to discharge the order, as he may be put to serious inconvenience and expense by it.

Higgins, Q.C., and *Oswald*, *contrà*, were not called upon.

JESSEL, M.R.:—

This is an appeal from an order of Mr. Justice *Fry* made under the 115th section of the *Companies Act*, 1862, on the application of a contributory under a voluntary winding-up, who applies under the 138th section to put the powers of the 115th section into force. The order, on the face of it, is made for the purpose of an investi-

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(1) Law Rep. 13 Eq. 179, n.

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gation with a view to fixing the directors with liability under the 165th section of the Act. The order is that certain persons, who are alleged, and not denied, to be capable of giving information as to the affairs of the company, should be examined as witnesses. It is not suggested in this case that Mr. *Carter's* application is otherwise than *boná fide,* by which I mean that he intends to prosecute the claim against the directors and the secretary, and that he thinks the evidence of these witnesses material to help him to prosecute it. In cases where the process of the Court is abused, I agree that any person who is affected by such an abuse may bring the case before the Court. But it appears to me that a mere witness ordered to be summoned under the 115th section has no right to apply to the Court to discharge that order. He is not more nor less than a mere witness, like a witness in any other case; but he has this protection, that in an ordinary action the subpœna issues as a matter of right at the option of the litigant, whereas in this case it cannot be issued without the opinion of the Judge of a superior Court being obtained that it is a proper case in which to issue a summons, which comes in lieu of the subpœna. The whole argument of Mr. *Bristowe* was that it might put the witnesses to great expense and inconvenience; but the answer to that is, they are no worse off than ordinary witnesses subpœnaed in an action; and, indeed, they are very much better off, for if a party to an action chooses to subpœna a great number of persons who know nothing about the matter, they must either attend, or by refusing to attend render themselves liable to proceedings being taken against them for disobedience to the subpœna. They cannot come to the Court to discharge the subpœna. The Court will not listen to such an application, and the persons in this case have still less ground for coming to the Court, the Judge of a superior Court having expressed his opinion that they are proper persons to be summoned under the Act. I think that disposes entirely of the application of the directors, who are purely witnesses.

I come then to the application of the liquidator. I agree that where a contributory comes to put the 115th section in force, whether under a compulsory winding-up or a voluntary winding-up, he must give notice to the liquidator. The liquidator, according to the practice of the Court, comes *ex parte*, and, as a general rule, he makes no affidavit, for a very good reason, that it is not desirable for him to put anything upon the files of the Court which can be inspected by the person against whom he intends to proceed, and which, if so inspected, might afford information which would enable him to defeat any proceeding to be taken against him. But where a contributory comes he is bound to give notice, and for this reason: The liquidator is, if I may say so, *dominus litis*; it is his business to enforce the claims of the company against individuals, and if he takes proceedings to make officers and directors liable for a misfeasance, he proceeds at his own time and in his own way, and he is entitled to say that he will not have the conduct of these proceedings taken out of his hands by any contributory who chooses to intervene. If when he gets the notice he comes to the Court and says that he is about to institute proceedings, the Court will not interfere with him; but if he comes to the Court and says that he considers the case hopeless, or that he has no funds available for the purpose, or that the case does not appear to him sufficiently promising to induce him to employ the funds of the company in litigation, he may refuse to take up the case, and if he so refuses, the Court may authorize the contributory who applies to take up the case. In that event there is an end of the matter so far as the liquidator is concerned. The proceedings are taken by the contributory applying. If they fail the liquidator loses nothing, while, if they succeed, he, or rather the company whom he represents, gets the proceeds of the proceedings. He has everything to gain and nothing to lose; what right, therefore, has he to interfere? As soon as he says that he does not wish to institute proceedings he loses all right to interfere with the proceedings which are taken. It therefore appears to me that not one of the present Appellants has what is called a *locus standi* for appealing.

Now as to the merits. The Judge in the Court below has expressed a decided opinion, after looking at certain books at which I have not looked, that there is good ground for thinking that certain recitals in the deed relating to the allotment of shares are untrue, and that the matter requires further investigation. He has looked into the matter, and has exercised his judgment. He is also of opinion (and that is not contradicted) that the

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persons summoned are capable of giving information about the business in hand, and about the dealings and estate and effects of the company. Now, that being the opinion of the Judge in the Court below, and the statute having provided that the Court may order the examination of any persons whom it may deem capable of giving information, and the Court having exercised a discretion, how can the appeal Court interfere? In *Clement's Case* (1) the point really argued before the Lord Chancellor, the other point not being taken on the part of the Appellant, was whether the case put was within the section, that is, whether the matter alleged was concerning the trade dealings, estate, or effects of the company, and on that point he affirmed the opinion of the Judge in the Court below, but he expressly says that the jurisdiction was discretionary, and that it was not for the Court above to interfere with the discretion of the Court below when the matter was within the terms of the section. Indeed it would be almost impossible to do so, because in these matters, as I have said, the Court acts without legal evidence, the object being to keep the proceedings secret from the person sought to be affected, and the practice is, and as far as I know always has been, that the liquidator, instead of making an affidavit, simply makes a written statement which he leaves with the Chief Clerk, who thereupon issues an order, and the written statement cannot be got at by anybody, whereas an affidavit can. It must be remembered that both the Chief Clerk and the Judge know a great deal more of the proceedings in the winding-up than the Court of Appeal can know, and there may be various grounds for exercising the discretion, upon which the Court of Appeal cannot possibly form any opinion. We must recollect also that it is not necessary to make out a *primâ facie* case—the probability of a case is enough. A fair suspicion may be well worthy of further investigation, and it may well be worth the expense and trouble of examining witnesses to see whether it is well founded. It is not necessary that the applicant should establish his case before he applies to the Judge; he may say to the Judge, "I have a strong ground for suspecting that a certain transaction was fraudulent; if it is proved to be so we shall get a large sum of money; will you let me lay out a

14 Ch D 24
13 Ch D 14

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(1) Law Rep. 13 Eq. 179, n. [illegible]

small sum of money in order to examine a witness or two, so as to ascertain the facts?" In that case the Court will exercise a discretion. In fact the whole object of the section is to assimilate the practice in winding-up to the practice in bankruptcy, which was established in order to enable assignees, who are now called trustees, in bankruptcy to find out facts before they brought an action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed. I never heard, as far as I know, of any case of a witness moving to discharge an order in bankruptcy for his examination; nor, except the case to which our attention has been called, am I aware of any case of such an application by a witness under a winding-up. It appears to me that this appeal fails as much in substance as it does in form, and must be dismissed.

BAGGALLAY, L.J.:—

I am of the same opinion. The *Gold Company* is in voluntary liquidation. Mr. *Carter* is a proprietor in that company. The 138th section of the Act provides that where a company is being wound up voluntarily, either the liquidator or any contributory of the company may apply to the Court, among other things, to exercise all or any of the powers which the Court might exercise if the company were being wound up by the Court. Among these powers are those contained in the 115th section, which enable the Court, after making a winding-up order, to summon before it persons of three classes: first, any officer of the company; secondly, any person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company; and thirdly, any person whom the Court may deem capable of giving information concerning the trade dealings, estate, or effects of the company. In each of the last two classes we find a certain qualification, but in the first there is no qualification. As regards the second class the qualification is that the persons summoned must be suspected of having in their possession some portion of the estate or effects of the company, or be supposed to be indebted to the company. And the

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qualification of the third class is, not that they must be persons capable of giving information, but that they must be persons "whom the Court may deem capable of giving information." In the case now under consideration it is said that some of the persons summoned do not fill the character of officials of the company. The liquidator certainly fills the position of an officer of the company, and some of the other persons summoned were directors. But there may be other persons included in the schedule who are not officers of the company. As regards such other persons, they must be persons whom the Court may deem capable of giving information. An application being made to Mr. Justice *Fry*, he deemed the several persons capable of giving information. It does not follow when they are called that they can give information which will be of the slightest use, but still he deems them capable of giving information. It is not desirable in a case of this kind for the Judge to go too far in stating the ground on which he deems these persons capable of giving information, because it might prejudice the prosecution of the subsequent inquiries. That being so, there may be a question whether there is a right of appeal at all, and at all events I cannot understand that there is a right of appeal on the part of any of the persons summoned as witnesses. No doubt in *Clement's Case* (1) the person summoned as a witness was the party who appealed against the order. No objection seems to have been raised upon that ground, but the appeal was dismissed, and therefore it was not necessary to raise a purely technical objection. But I find that case relied on in *Fricker's Case* (2), where the order was made *ex parte* for examination of the witnesses. It appears to me on every ground that this appeal must fail.

THESIGER, L.J.:—

I prefer in this case to express no opinion upon the point whether the Appellants have any *locus standi*, but at the same time I do not wish it to be supposed that I dissent in any way from the view which has been expressed upon that point by the

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(1) Law Rep. 13 Eq. 179, n.
W.N. (1873) 172. 63

(2) Law Rep. 13 Eq. 178.
W.N. [illegible] 172. 62

Master of the Rolls. It seems to me, however, sufficient to say that no ground has been shewn on which the Court ought to interfere with the judicial discretion which has been exercised by Mr. Justice *Fry* under the 115th section of the Act. That section is pre-eminently one in which the Judge of first instance ought to be trusted to exercise his discretion properly. He is not to exercise that discretion in the way in which it would have to be exercised where the rights between the parties are to be determined; he is not even to see that there is a *primâ facie* case made out under the 165th section of the Act. All he is to see is either that there is a reasonable suspicion that there is a case under that section, or a reasonable probability that the evidence acquired through the medium of the examination of the witnesses may lead to such a case. That obviously is one of those cases in which it would be improper for the learned Judge to express an opinion whether a case is made out under the 165th section, and one therefore in which it would be highly inconvenient for this Court to say whether or not he has exercised his discretion properly. One of my principal reasons for not giving any opinion as to whether the Appellants in this case have any *locus standi* is this, that it appears to me that this Court ought not to interfere with the discretion of the learned Judge in the Court below, except in such an extreme case that a mere witness probably would be held to have a *locus standi.*

Solicitors: *Stevens & Harries; Wild, Browne, & Wild.*

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In re ST. NAZAIRE COMPANY.

Practice—Rehearing—Judicature Act, 1873, ss. 16, 17, 18.

Under the system of procedure established by the Judicature Acts no Judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other Judge, the power to rehear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal.

14 Ch D 559
17 Ch D [illegible]
19 Ch D 81
20 Ch D 14
7 P D 93
21 Ch D 159
24 Ch D 490
25 Ch D 284

THE *St. Nazaire Company, Limited,* was incorporated in 1864 as a limited company, under the *Companies Act*, 1862, and the *European Bank, Limited,* acted as their bankers.

In 1865 an arrangement was come to for amalgamating the *St. Nazaire Company* with a French company called the *Société de Commerce*, and the amalgamation was effected by proceedings taken in *France*.

On the 6th of June, 1866, a resolution which had been previously passed for voluntarily winding up the *St. Nazaire Company* was confirmed, and on the 6th of June, 1867, an order was made for continuing the winding-up under the supervision of the Court.

In July, 1866, the *Société de Commerce* became bankrupt according to French law. The liquidators of the *European Bank*, which also was in course of winding-up, claimed against the *Société de Commerce* for a large sum alleged to be due from the *St. Nazaire Company* to the bank. The principal part of this claim was established, but the French Courts, on the 26th of February, 1876, finally disallowed the residue thereof.

The liquidators of the *European Bank* thereupon claimed to prove in the winding-up of the *St. Nazaire Company* for so much of their demand as had been disallowed in *France*. The sum then claimed amounted to more than £20,000.

On the 27th of January, 1877, a summons by the liquidators of the *European Bank* to be admitted as creditors of the *St. Nazaire Company* was disposed of by Vice-Chancellor *Malins* after full argument, and his Lordship made an order "That the claim of the liquidators of the said bank to be admitted as creditors against the said *St. Nazaire Company, Limited,* be allowed for such an amount as shall be certified to be due to the said *European Bank, Limited,* in respect of their claim in the winding-up of the said company."

The liquidators of the *St. Nazaire Company* appealed from this order, and on the 27th of April, 1877, the appeal was dismissed with costs.

On the 27th of November, 1877, the Chief Clerk made his certificate, which was filed on the 13th of December, by which he found £15,277 19*s.* 5*d.* due to the *European Bank* for principal and interest of advances, and £7040 for commission.

On the 19th of December, 1877, *H. F. C. Andrew,* a contributory of the *St. Nazaire Company,* took out a summons to vary the certificate, and on the 9th of February, 1878, an order was made by Vice-Chancellor *Malins* appointing three contributories of the *St. Nazaire Company* liquidators of that company to act with the then present liquidator for the purpose of applying for a rehearing of the order of the 27th of January, 1877.

The three contributories above mentioned and *Andrew* accordingly presented a petition, the company being joined as a Petitioner. The petition stated the facts of the case at length, and by paragraph 40, after stating the order of the 27th of January, 1877, went on to allege that Vice-Chancellor *Malins* was misled by the form of a minute prepared by his Chief Clerk, which was treated by both parties as accurate, and by the absence of any proof or statement of many most material facts bearing upon the question whether the *St. Nazaire Company,* or the shareholders therein, were or were not liable to the bank. Then by paragraph 41 it was stated that "the liquidators of the *St. Nazaire Company* afterwards appealed from the order of the said Vice-Chancellor to Her Majesty's Court of Appeal, but the appeal was dismissed. In consequence of the defective evidence before the Court, the judgment of the said Court of Appeal was delivered under an erroneous impression as to the true facts of the case, and in particular as to the circumstances under which the original claim of the bank against the *Société de Commerce* was made and settled, and the subsequent claim brought forward and adjudicated upon." The petition prayed, "1. That the said order of the 27th day of

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January, 1877, and the said certificate of the 29th of November, 1877, may be discharged, and that the said claim of the *European Bank* may be reheard, and that it may be declared that under the circumstances hereinbefore stated the said bank were not at the date of the winding-up of the *St. Nazaire Company* and are not creditors of the said company."

The prayer then asked for relief against calls made for satisfying the claims of the *European Bank*, and then proceeded:—

"3. Or if the Court shall be of opinion that all material facts were before the Court upon the hearing of the said application on the part of the *European Bank*, that the Petitioners may be at liberty in the name of the *St. Nazaire Company* or otherwise as they may be advised to appeal from the said order of the 27th day of January, 1877, to the House of Lords, and that in the meantime all proceedings under or consequential on such order may be stayed."

The petition came on before Vice-Chancellor *Malins* on the 20th of July, 1878, when his Lordship, as was stated, expressed his opinion to be that it was not a petition of rehearing, and ought to be allowed to proceed, and gave leave to the Petitioners to amend it(1)

The petition was accordingly amended, and the prayer as amended was as follows:—

"1. That the said certificate dated the 29th of November, 1877, may be discharged or varied, and that the said claim of the said *European Bank* may be disallowed, and that it may be declared that under the circumstances hereinbefore stated the said bank were not at the date of the winding-up of the *St. Nazaire Company* and are not creditors of the said company, and that if and so far as may be necessary for that purpose the said order of the 27th day of January, 1877, may be discharged, and the claim of the said bank on which such order was made reheard."

2. Relief as to calls.

"3. Or if the Court shall be of opinion that in consequence of the said order of the 27th of January, 1877, or of the appeal from the same having been dismissed, the Court cannot grant the relief

(1) See W.N. (1878) 158.

hereby prayed, that the Petitioners may be at liberty in the name of the *St. Nazaire Company* or otherwise as they may be advised to appeal to the House of Lords from the said judgment of the Court of Appeal, and that in the meantime all proceedings under or consequential on such order of the 27th day of January, 1877, and the said certificate, may be stayed."

On the 3rd of May, 1879, an adjourned summons by the Petitioners for an affidavit by the liquidators of the *European Bank* as to documents relating to the summons in question on the pending petition was heard by Mr. Justice *Fry*, and his Lordship, being of opinion that he was bound by the decision of Vice-Chancellor *Malins* that this was a properly pending petition, made an order for an affidavit of documents by the liquidators of the bank and for production. The bank appealed. The appeal came on for hearing on the 18th of June.

Glasse, Q.C., and *Dundas Gardiner*, for the Appellants.

[JESSEL, M.R.:—It appears to me that the petition is irregular, but that question could not be entertained by Mr. Justice *Fry* while an order by Vice-Chancellor *Malins* allowing it to be amended was in force. The matter had better be brought before us by drawing up the Vice-Chancellor's order to amend and appealing from it, as well as from the order for production.]

The case accordingly stood over for the order of Vice-Chancellor *Malins* to be drawn up, and an appeal from it presented, and came on again on the 25th of June.

Higgins, Q.C., and *Grosvenor Woods*, for the Petitioners:—

We contend that, independently of the *Companies Act*, 1862, s. 124, the Vice-Chancellor had jurisdiction to entertain this petition: *Miller's Case* (1); *Plumstead Water Company* v. *Davis* (2).

[JESSEL, M.R.:—In *Miller's Case* no order had been drawn up. A Judge can always reconsider his decision until the order has been drawn up. What you have to make out is, that the old practice in Chancery of a Judge rehearing his own decisions exists under the Judicature Acts.]

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(1) 3 Ch. D. 661.

(2) 28 Beav. 545.

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In *Flower* v. *Lloyd* (1) it was held that the Court of Appeal cannot rehear its own decisions, but that turns upon its being only a Court of Appeal with no original jurisdiction. The case of *In re Anglo-Californian Gold Mining Company* (2) is in our favour.

[*Glasse*, Q.C. :—In *In re National Funds Assurance Company* (3) the Court refused to follow that decision.

JESSEL, M.R. :—It is idle to cite a decision in 1861 as bearing on this point.]

We submit that the case shews that persons not party or privy to the original order may come in by petition in this way and complain of the order.

[JESSEL, M.R. :—That case was decided under the Act of 1849, s. 33. We have now sect. 124 of the *Companies Act*, 1862.]

Sect. 124 only applies to appeals. The decision in *Jopp* v. *Wood* (4) is in our favour.

[JESSEL, M.R. :—That was an ordinary petition in a suit.]

If the words as to rehearing are struck out there is still enough to give the Court jurisdiction; the proceeding is analogous to a supplemental bill in the nature of a bill of review.

[JESSEL, M.R. :—What you have to make out is that a Judge of the High Court has any jurisdiction to rehear. The powers of the Court of Chancery have been transferred to the High Court and the Court of Appeal. To which of these is the jurisdiction of rehearing attached ?]

The petition cannot be wholly dismissed, as it involves matters in which the Vice-Chancellor had clear jurisdiction on summons. Where material facts have been kept back the Court will be anxious to set the matter right, and the utmost liberality will be shewn as to leave to amend: *Budding* v. *Murdoch* (5).

[JESSEL, M.R. :—I never went so far as is represented in the head-note to that case.]

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(1) 6 Ch. D. 297.

(2) 1 Dr. & Sm. 628.

(3) 4 Ch. D. 305.

(4) 33 Beav. 372. 11 Jur
63.

(5) 1 Ch. D. 42.

JESSEL, M.R.:—

The petition before us in this case may be roughly described as a petition of appeal from an order made by the Appeal Court. It came on before Vice-Chancellor *Malins*, and he is reported to have said, but on what ground we are not informed, that in his opinion it was not a petition of rehearing; but it appears to me to be quite plain that it was. When it came before him, notwithstanding the opposition of the Respondents, he gave liberty to amend. The amendment was made, and in my opinion even after the amendment it was substantially a petition of rehearing, though not quite so plainly and clearly so as it was before. After that an application was made to Mr. Justice *Fry*, to whom the matter had been transferred, for an order for the discovery of documents, and Mr. Justice *Fry* made the order, conceiving himself bound by the order of Vice-Chancellor *Malins*, to treat this, not as a petition of rehearing, but as an original petition, and one in which discovery could be ordered.

The present appeal is from the order so made by the Vice-Chancellor *Malins* as well as the consequential order of Mr. Justice *Fry*.

The first question to be considered is whether this is a petition of rehearing, and I cannot imagine on what grounds it can be otherwise described. Upon the application of the liquidator of the *European Bank* to be admitted a creditor against the *St. Nazaire Company* for a sum of £22,300 7*s.* 2*d.*, alleged to have been advanced and paid by the bank to the company, with interest, the Vice-Chancellor, on the 27th of January, 1877, made an order "that the claim of the liquidators of the said bank to be admitted as creditors against the said *St. Nazaire Company, Limited*, be allowed for such an amount as shall be certified to be due to the said *European Bank, Limited*, in respect of their said claim in the winding-up of the said company." The meaning of that was that in principle the claim was allowed, and the amount was left to be ascertained in Chambers. It was equivalent in effect to a declaration that the claim was well founded, with a reference to Chambers to ascertain the amount only, but the order having been made upon summons the term "declare" is not employed. It is often so convenient to make a declaration, that I have constantly made declarations both on petition and on summons; but there used to be a notion in the Court of Chancery that the word "declaration" could not be used when the order was made on interlocutory application, and that accounts for the form of the order. That order was appealed from, and on the 27th of April, 1877, the appeal was dismissed with costs, so that the appeal Court decided that the claim was well founded, but that the amount due was to be ascertained by the Judge in Chambers.

The petition is presented by certain contributories of the *St. Nazaire Company;* not pursuant to leave, for the leave given included the liquidator, but the petition was presented by contributories of the *St. Nazaire Company* only, without the liquidator.

Now, first of all, we must see for what the petition asks. When we look at the body of the petition we find that in the 40th paragraph it says that the Vice-Chancellor in making his order of the 27th of January, 1877, was misled by the form of the minute of the Chief Clerk, which was treated by both parties as accurate when it was inaccurate; so that as regards the Vice-Chancellor there is a complaint that in making the order he was misled. Then in the 41st paragraph the order of the Court of Appeal is attacked, not on the same ground as the decision of the Vice-Chancellor, but in this way: "The liquidator of the *St. Nazaire Company* afterwards appealed from the order of the said Vice-Chancellor to Her Majesty's Court of Appeal, but the appeal was dismissed. In consequence of the defective evidence before the Court, the judgment of the said Court of Appeal was delivered under an erroneous impression as to the true facts of the case." Therefore it is alleged that the judgment of the Court of Appeal was wrong, but upon a different ground. Then it goes on to allege what the true facts of the case were, and then it states that a call has been made by the liquidator, then that a summons has been taken out to set aside and to vary the certificate by the Chief Clerk, which summons, as I understand, is still pending, and then they pray "that the said order of the 27th day of January, 1877, and the said certificate dated the 29th day of November, 1877, may be discharged." That is that they ask to discharge an order affirmed by the Court of Appeal. "And that the said claim of the said *European Bank* may be reheard, and that it may be declared that under the circumstances hereinbefore stated the said bank were not at the date of the winding-up of the *St. Nazaire Company*, and are not, creditors of the said company." That is the declaration they ask. Then it goes on to ask for a declaration, "that having regard to the facts herein stated a call ought not to have been made upon the petitioners (other than the company), or any of the other contributories of the *St. Nazaire Company*, or at all events that such call ought not to have been made on such of the former shareholders in the *St. Nazaire Company* as gave up their shares in the *St. Nazaire Company* in exchange for shares in the *Société de Commerce*, and have paid the amounts of their liability in respect of such last-mentioned shares, or that such call, if allowed at all, may be limited to the amount required for satisfying any claims for costs or otherwise."

If it had not been that the *European Bank's* order to be admitted as creditors was sought to be discharged, they ought not to have been parties to an application as to a call order, for that is a matter between the liquidator and the contributories, and not one to which the creditors are properly parties, although, of course, if the liquidator does not do his duty a creditor may apply that the call may be made. Then it goes on, "or if the Court shall be of opinion that all material facts were before the Court upon the hearing of the said application on the part of the *European Bank*, that the petitioners may be at liberty in the name of the *St. Nazaire Company* or otherwise as they may be advised to appeal from the said order of the 27th day of January, 1877, to the House of Lords, and that in the meantime all proceedings under or consequential on such order may be stayed." Now, so far as relates to the first part, the liberty to appeal, the petition is not one with which the *European Bank* could be served; that is a matter between the contributories and the liquidator with which the Appellants have nothing whatever to do. No doubt the application for a stay of proceedings will affect them very much; but you cannot apply for a stay until you have made some progress towards an appeal. Therefore that will not help the Petitioners. Then in the usual form: "or that the said order and certificate may be varied in such manner as to the Court shall seem just." I have gone through the whole of the prayer in order to shew that in substance it is a petition of rehearing, and nothing more. It is in substance simply a petition for rehearing, because the fringes that are added in the other paragraphs of the prayer are not matters with which the *European Bank* has any concern, and therefore an order to amend would not be proper as against them, if the only matter with which they have any concern is not a matter within the jurisdiction of the Court below. Consequently the only point to which I think it necessary to direct my attention on the present occasion is the question of jurisdiction. If the Vice-Chancellor had no jurisdiction, the petition ought to have been dismissed as against the *European Company*, because they have nothing else to do with the matter. Whether afterwards any other proceedings may be taken for the purpose mentioned, with which the *European Company* has nothing to do, may be a matter for the consideration of the Appellants, and the dismissal will not affect those questions.

Now, the Vice-Chancellor, thinking, as it is said, that it was not a petition for rehearing, gave liberty to amend. The amendments are made, and I must say, looking at the amendments, that it appears to me quite as much a petition for rehearing as it was before. Instead of asking that the order may be discharged, it asks that it may be discharged or varied. Instead of asking that the claim of the *European Bank* may be reheard, it asks that the claim of the *European Bank* may be disallowed. Although there is a variation in words there is no variation in substance. Then it asks for a declaration that they are not creditors; and asks that, so far as may be necessary for that purpose, the order may be discharged. If they are not creditors at all it ought to be discharged altogether. It really in substance remains as much a petition of rehearing as before, and the alternative is, that if, in consequence of the said order of the 27th of January, 1877, and of the appeal from the same having been dismissed, the Court cannot grant the relief hereby (that is, hereinbefore) prayed, they may be at liberty to appeal, upon which I have already made my remarks. Therefore, whether we consider the original or the amended petition, it is a petition presented to a Judge of the High Court to rehear a decision of the Appeal Court, I should have thought that the mere statement of that would be sufficient to shew that the Judge below had no jurisdiction. It would be a wonderful result indeed if the *Judicature Act* empowered a Judge of an inferior Court to rehear a decision of the Appeal Court which perhaps had reversed his decision. Upon that theory, how long is the thing to go on? If the Judge below has this power, he may exercise it by reversing the decision of the Appeal Court where the Appeal Court had reversed his decision.

Then it was said that under the old practice the Court of Chancery, that is, the Judges of the Court of Chancery, the Lord Chancellor, the Master of the Rolls, and the Vice-Chancellor, could rehear not only their own decrees, but the decrees of their predecessors, that is, those whom they succeeded. No doubt it was so, but does that jurisdiction continue? If it does, the most extraordinary results will follow. The power to rehear was confined by General Orders. The time allowed had been twenty years, but at last it came down to five years, and the power to appeal given by the new rules is only for one year; therefore if such a power were considered to remain vested in the Judges of the High Court it would follow that after the lapse of one year you could not appeal at all, but you might at any time within five years present your petition of rehearing to the Judge himself, and then, if he refused it on the ground that he thought he was right before, which would be the most probable result, you could then appeal to the Appeal Court, and thereby get five or six years for appealing instead of one. That would be so remarkable a result that hardly any one could believe that such was the true construction of the Act of Parliament or the Rules.

Having considered these points, I come to the Act itself, and when we consider the nature of the jurisdiction transferred I think we shall see exactly how much of the old jurisdiction of the Court of Chancery was transferred to the High Court, and how much to the Court of Appeal. The jurisdiction of the old Court of Chancery was no doubt originally the Lord Chancellor's jurisdiction, and of course, like all jurisdictions, was originally derived from the Sovereign and exercised by the Lord Chancellor; it was afterwards exercised by his deputies in Equity, as regards the Master of the Rolls by long usage confirmed by Act of Parliament in the reign of George II., and as regards the Vice-Chancellor by

Act of Parliament passed in the early part of this century, when the first Vice-Chancellor was created. Now, all these Acts of Parliament give the Judges of first instance in the old Court of Chancery the whole jurisdiction which was vested in the Lord Chancellor, subject only to this, that there was a right of appeal from them to the Lord Chancellor, but of course they could not alter his decisions. Now, part of the old jurisdiction of the Lord Chancellor was a right to rehear his own decisions, or the decisions of a preceding Lord Chancellor; and similar powers passed under statute to the Master of the Rolls and the Vice-Chancellor, and they also had a right to rehear their own decisions and the decisions of their respective predecessors. At first that was an unlimited right, as I said before; it was afterwards limited by General Order to twenty years, and finally to five years, and that existed down to the time of the passing of the *Judicature Act*. Now, what was that right of rehearing? Was it original jurisdiction, or was it appellate jurisdiction? There can, as it seems to me, be but one answer to that question—it was appellate jurisdiction. No doubt it sometimes was an appeal from a Judge to himself, but it was much more frequently an appeal from a Judge to his successor. One of the very first cases heard before Lord *Lyndhurst* was a rehearing of a case before Lord *Eldon*, whose decision he reversed. In fact, the hope of every appellant was founded on the change of the Judge. Such a petition of rehearing could not be described otherwise than as an application in the nature of an appeal; indeed, every rehearing was an appeal, although every appeal was not a rehearing.

That being so, what are the words used in the *Judicature Act?* The transfer of the jurisdiction is contained in the 16th and 17th sections of the Act of 1873 explained by the 18th. The 16th section says: "The High Court of Justice shall be a Superior Court of Record, and subject, as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which at the commencement of this Act was vested in or capable of being exercised by," among other Courts, "the High Court of Chancery as a Common Law Court as well as a Court of Equity." Therefore, the whole jurisdiction of the Court of Chancery is transferred, subject as in the Act mentioned, and therefore subject to the next following section, which says: "There shall not be transferred to or vested in the said High Court of Justice by virtue of this Act any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy." Now, the Court of Appeal in Chancery included the Lord Chancellor no doubt, and it of course meant the jurisdiction of that Appellate Court; but the matter is made plain by the 18th section: "The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following, (that is to say) all jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction." Now, the jurisdiction and powers of the Lord Chancellor were undoubtedly included in the jurisdiction of the High Court of Chancery; and if the Court of Appeal is to have the appellate jurisdiction of the Lord Chancellor and the Court of Appeal in Chancery, is it reasonable to suppose that part of the appellate jurisdiction vested in the High Court of Chancery, that is the Chancellor, who was really the High Court of Chancery, was transferred to the Judges of the High Court with the remarkable consequence I have already referred to? I am satisfied upon a fair reading of the Act, even without reference to the Rules, we ought to come to the conclusion that the Court below has no such jurisdiction; but when we come to the 58th Order I think the case is clear. First of all, we find that there are times limited for appeals. Now, it would be a most remarkable thing, as I said before, if the old practice were to apply so as circuitously to give a longer time than the Rules directly allow. The time for appealing from an order in the winding-up of a company is by the 9th rule the same as an appeal from an interlocutory order under rule 15, which is twenty-one days, except by leave of the Court of Appeal; and we find that no other appeal can, except by such leave, be brought after the expiration of one year. Therefore, if no other appeal can be brought after the expiration of one year, and, as I said before, all these rehearings are in the nature of appeals, and are appeals in fact, one year is the limit for all appeals to the Court of Appeal; and this confirms the view which I have already stated,

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that there is no appeal at all to the Judge of the Court of first instance against any decision, either of his predecessor or of the Appeal Court. In fact, the only surprising part of the matter is that any one should have thought for a moment that a rehearing of this kind, involving a discharge, although not precisely in express terms, of an order of the Appeal Court, could be presented to a Judge of the Court of first instance.

It seems to me, therefore, that on this ground the petition should have been dismissed. I have refrained purposely from entering into the discussion of what might happen in some of the cases put at the bar of great hardship. I, on the one hand, am neither prepared to say that such cases of great hardship ought to be without a remedy, nor, on the other hand, am I prepared to say that the general good of the community requiring a final end to be put to litigation would not be better insured even if those exceptional cases of great hardship are not provided for. The matter may be looked at either way, and when a proper case is brought before the Appeal Court for discussion as to whether any remedy exists or not, I think it will be sufficient time to consider and decide upon that question. It seems to me that the decision below ought to be reversed, and that the Appellant should have the costs of this petition.

BAGGALLAY, L.J.:—

I am of the same opinion, and I have very few words to add. It appears to me that the Court from whose order the appeal is brought had no jurisdiction whatever to make the order. However the language of the petition may be changed, the order from which this appeal is brought is substantially an order made on the rehearing of the order of January, 1877. Having regard to the several clauses of the *Judicature Act*, to which the Master of the Rolls has referred, to which I may add also the 19th section of the same Act, which provides, "That the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice or of any Judges or Judge thereof," it appears to me that, with the particular exceptions which are to be found in different sections of the Act, the power

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of rehearing is vested in the Court of Appeal, and in that Court alone.

There is a further difficulty in the present case, that, under the 124th section of the *Companies Act*, 1862, no rehearing can be brought after the expiration of three weeks, without express permission for that purpose given by the Court of Appeal, and no such leave has been given in the present case. The 9th rule of the 58th Order of the *Judicature Act* is a provision as regards the time within which such appeals are to be brought, and the time fixed by that rule is substantially the same as that mentioned in the 124th section.

THESIGER, L.J.:—

I entirely agree with the conclusions at which the other members of the Court have arrived, and with the reasons they have given for those conclusions. I would only add that they seem to me to harmonize entirely the practice under the *Judicature Act* in all Divisions of the High Court, because, whatever may have been the practice in the High Court of Chancery before the *Judicature Act* as to the review of their decisions or the rehearing of their decisions, nothing can be clearer than that there was nothing analogous to that in the Common Law Courts, and it is equally clear that under the *Judicature Act*, after once the Common Law Division of the High Court of Justice has pronounced a decision upon the matter in dispute which is being litigated between the parties, there is no power in that Division of the High Court to rehear or review that decision upon any suggestion that it has been misled, or that the parties have not brought all the evidence which ought to have been brought in order to enable the Court to arrive at a just conclusion. It certainly would seem to me to be running counter to the idea of fusion, which is at the bottom of the *Judicature Act*, if it were held that while that is impossible in the Common Law Division of the High Court, it is possible in the Chancery Division.

Solicitors: *G. S. & H. Brandon; Argles & Argles.*

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V.-C. M.

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[1876 G. 140.]

Nuisance—Pollution of Stream—Local Board—Neglect of Public Duty—Mandamus—Injunction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 17, 19—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8.

18 Ch D 605

607-8

20 Ch D 595.7

598-9, 601,

602-4-6-7-8-9

616-17

22 Ch D 226

23 Ch D 769

~~770~~, 2, 3.

A local board, under the *Public Health Act*, 1875, causing a nuisance by any act which, independently of the statute, would have given a cause of action to any person, may be made liable in damages, or be restrained by injunction, unless they can shew a justification under the powers of the statute. But if a local board do no act themselves to cause a nuisance, but neglect to perform their duty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerogative writ of mandamus; and *semble*, this jurisdiction, notwithstanding the 25th section of the *Judicature Act*, 1873, ought not to be exercised except by the Queen's Bench Division.

The Defendants were a local board constituted in November, 1875, under the *Public Health Act*, 1875. The Plaintiff complained that for some time before and since the Defendants became the sanitary authority, sewage was allowed to fall into a stream passing near his residence so as to pollute it and cause a nuisance to him. He complained to the Defendants in May, 1876, and nothing having been done he brought an action against them in July, 1876, for damages and an injunction:—

Held (reversing the judgment of *Malins*, V.C.), that, assuming that an actionable nuisance existed, as the Defendants had themselves done no act to create or increase it, the Plaintiff had no cause of action.

THE Plaintiff in this action was Mr. *F. H. N. Glossop*, the owner and occupier of a house and pleasure-grounds known as *Silver Hall*, within the district of the Local Board of *Heston* and *Isleworth*, claiming an injunction against the Local Board from permitting sewage, or water polluted by sewage or other offensive matter, to pass through the drains or channels under their control into the River *Crane* in such a manner as to render the water of the river unfit for use by the Plaintiff, and injurious to the health and comfort of persons residing in his house.

The River *Crane* is an ancient watercourse passing through the Plaintiff's pleasure-grounds, and at a distance of about thirty yards from his house.

The Plaintiff alleged that until recently the water of the river had been clear and wholesome, and full of clean feeding fish, but that now it had become polluted with sewage, which had rendered it a nuisance, and injurious to the health of the Plaintiff and his family. He alleged that the condition of the stream was occasioned by the sewage poured into it from the drains and sewers under the control of the Defendants.

Up to the month of November, 1875, the sanitary authority of the district was the Rural Sanitary Authority of the *Brentford* Union. In that month the Defendants were constituted the local authority for the parishes of *Heston* and *Isleworth* under the *Public Health Act,* 1875 (38 & 39 Vict. c. 55).

By sect. 12 of that Act all the property, real and personal, of the previous sanitary authorities was vested in the local authorities constituted by the Act, and it was made liable for all obligations and liabilities incurred by such previous authorities.

By sect. 13 all existing and future sewers (with certain exceptions) were vested in the local authority.

By sect. 15 it was enacted that "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

By sect. 16 the local authority were empowered to make sewers within their district.

By sect. 17 it was provided that "Nothing in this Act shall authorize any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or any canal, pond, or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond, or lake."

Sect. 19 enacted that "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

Sect. 27 gave them power to construct works and to acquire land for the purpose of disposing of and disinfecting the sewage.

Sect. 28 gave them power, with the sanction of the Local

Government Board, to join with the local authorities of adjoining districts in a scheme for making sewers.

Sect. 299 enacted that where complaint was made to the Local Government Board that a local authority had made default in providing their district with sufficient sewers, &c., or that a local authority had made default in enforcing any provisions of the Act which it was their duty to enforce, the Local Government Board should make an order limiting a time for the performance of their duty in the matter of such complaint: and if such duty was not performed by the time limited in the order, such order might be enforced by writ of mandamus, or the Local Government Board might appoint some person to perform such duty, and direct the expense of performing the same, together with a reasonable remuneration to the person appointed, to be paid by the authority in default.

The Plaintiff, in 1874, complained of the nuisance under which he suffered to the *Brentford* Union Sanitary Authority, who admitted the existence of the nuisance and held meetings to consider how to remedy it.

In April, 1876, the Conservators of the *Thames* gave notice to the Defendants, who, as before stated, had been appointed in November, 1875, to divert the sewage of their district from the *Thames* or any stream communicating with it. In May, 1876, the Defendants passed a resolution that the consideration of the drainage question be deferred for three months. In the same month the Plaintiff complained of the nuisance to the Defendants, and the Defendants, on the 13th of June, passed a resolution to resolve itself into a committee to consider the drainage question and to adopt such course as they might deem expedient.

Nothing, however, was actually done to abate the nuisance, and after some further correspondence the Plaintiff brought the action on the 12th of July, 1876.

The Defendants in their defence denied the existence of the nuisance, and alleged that the state of the River *Crane* was the same as it had been for more than twenty years, and that it had in fact received a considerable amount of sewage for many generations. They stated that they had not had time to provide a proper system of sewers for their district, but intended as speedily as possible to provide a proper system of sewers and proper sewage works.

They also alleged that considerable difficulty had arisen as to the manner in which the sewage should be dealt with, and that it was proposed that all the districts in the *Thames Valley* should combine to carry out one entire system of drainage; but some of the local boards were adverse to such proposal.

They alleged that they had procured a report as to sewage of the district, and had under consideration a system of drainage which they intended to carry into effect unless the Local Government Board compelled them to combine with other local boards in the *Thames Valley*.

The Plaintiff moved for an injunction in the terms of his claim, which was by consent turned into a motion for judgment, and both parties went into evidence. The Vice-Chancellor having heard all the evidence adjourned the case till the Hilary Sittings in 1878. The case came on again on the 19th of March, 1878, and on the 25th of March the Vice-Chancellor made an order that it be referred to Lieutenant-Colonel *Hope* to inquire and report whether, in consequence of the sewage flowing into the River *Crane*, the river was in such a state as materially to interfere with the enjoyment of the Plaintiff's residence, and ordered the trial to be adjourned till he had made his report.

Lieutenant-Colonel *Hope* by his report, dated the 30th of April, 1878, reported that the river was in such a state as materially to affect the comfort and enjoyment of the Plaintiff's residence.

The action came on again on the 4th of June, 1878.

Glasse, Q.C., and *Decimus Sturges*, appeared for the Plaintiff.

Higgins, Q.C., and *Methold*, for the Defendants.

MALINS, V.C., said that on the balance of the evidence, which was very contradictory, he was of opinion that the Plaintiff had good ground for complaint, and that opinion was confirmed by the report of Colonel *Hope*. His Lordship therefore granted an injunction restraining the Defendants on and after the 4th of December, 1878, from causing or permitting any sewage or other

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offensive matter to flow through the drains under their control into the River *Crane*, in such manner as to render the water unfit for use by the Plaintiff and injurious to the health and comfort of persons resident in his house, and from causing or permitting any new outfall to be made for conveyance of the sewage into the River *Crane*, and he ordered the Defendants to pay the costs of the action.

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The Defendants appealed from this judgment. The time for the commencement of the injunction was afterwards extended.

The appeal came on for hearing on the 5th of May, 1879.

Higgins, Q.C., and *Methold*, for the Appellants:—

The evidence did not establish the facts charged in the claim. No material nuisance was proved. The Vice-Chancellor was himself in doubt as to the effect of the evidence, and really based his judgment on the report of Colonel *Hope;* but that report is unsatisfactory, and will not bear examination. Therefore, on the facts we are entitled to judgment.

But we also say that, admitting the nuisance, the Plaintiff has no cause of action against the Local Board. The nuisance was not caused by any act of theirs. It is the result of what was done before their authority commenced. If every individual had a right of action against a local board directly they were appointed, no one would consent to serve on it. If they had made new drains which increased the nuisance, or if they had been guilty of gross negligence, it might have been different; but there is no case in which a local authority has been held liable for acts done by their predecessors: *Oldaker* v. *Hunt* (1); *Attorney-General* v. *Luton Board of Health* (2); *Manchester, Sheffield, &c., Railway Company* v. *Worksop Board of Health* (3); *Attorney-General* v. *Mayor of Birmingham* (4); *Spokes* v. *Banbury Board of Health* (5); *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (6); *Attorney-General* v. *Corporation of Halifax* (7); *Attorney-General* v.

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(1) 6 D. M. & G. 376. 7 Jur NS 785

(2) 2 Jur. (N.S.) 180.

(3) 23 Beav. 198. 3 Jur NS 505

(4) 4 K. & J. 528.

(5) Law Rep. 1 Eq. 42.

(6) Ibid. 1 Ch. 349.

(7) 17 W. R. 1088.

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Leeds Corporation (1); *Attorney-General* v. *Cockermouth Local Board* (2); *Attorney-General* v. *Hackney Local Board* (3).

The onus is on the Plaintiff to shew that there has been an increase of nuisance through the acts of the Defendants, and if so, that it is a material increase: *Baxendale* v. *McMurray* (4); *Attorney-General* v. *Gee* (5); *Attorney-General* v. *Mayor of Kingston* (6); *Lilliwhite* v. *Trimmer* (7).

The duty of the Defendants is to make a complete system of sewers, and this cannot be done without serious consideration and negotiations with neighbouring boards; and if they neglect their duty, the Local Government Board may be appealed to, and have power to make them perform it, or to appoint some other persons to do it: 38 & 39 Vict. c. 55, ss. 279, 280, 281, 299; 39 & 40 Vict. c. 75, s. 3. Various schemes have been tried and have failed, and there is now a scheme for a system to include all the *Lower Thames Valley* under the 41 & 42 Vict. c. clxii. The Defendants have shewn no negligence, and have done and are doing all they can to devise some efficient scheme. If they are to be interfered with at the suit of every landowner, it will be impossible for them to perform their duty.

Glasse, Q.C., and *Decimus Sturges*, for the Plaintiff:—

It is true that the nuisance began while the sewers were under the government of the *Brentford* Union, but the Defendants were their successors, and all the property and powers, and also the liabilities, of the *Brentford* Union were vested in them: 38 & 39 Vict. c. 55, ss. 12, 13, 15, 16, 17, 19, 90, 91, 92. By the 17th section they are not to "use" a sewer running into a natural stream until the sewage is purified. By the 19th section they are required not only to construct but to "keep" sewers so as not to be a nuisance. They have the fullest power to do this, and if they do not do it there is a right of action in those who suffer from their negligence. They have themselves admitted their liability, and have passed resolutions shewing that they admitted that there was a nuisance. The argument on the other

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(1) Law Rep. 5 Ch. 583.

(2) Ibid. 18 Eq. 172.

(3) Ibid. 20 Eq. 626.

(4) Law Rep. 2 Ch. 790.

(5) Ibid. 10 Eq. 131.

(6) 34 L. J. (Ch.) 481. 11 Jur. N.S. 597

(7) 36 L. J. (Ch.) 525. 15 W.R. 763: W.N. (1867) 141

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side, from the inconvenience which would arise if every one could bring an action directly the local board are appointed, is merely visionary. For the Court will always give proper time for a public body to do what is necessary, if they are endeavouring *bonâ fide* to do it. But in the present case the Defendants have done nothing, although they have made many promises to do something to remedy the nuisance. In such a state of things a mandatory injunction will be granted. The Defendants have a duty cast upon them by their Act, and they have failed to do it.

[Brett, L.J.:—If a public body fails to do its duty, will an action for injunction lie? Is not a mandamus the proper remedy?]

If a mandamus could be granted, a mandatory injunction will also be granted, where a private injury has been committed. But under the present practice any Court may now grant a mandamus: *Judicature Act*, 1873, s. 25, sub-s. 8; Rules of Court, 1875, Order LII., r. 4; *In re Paris Skating Rink Company* (1); *Seton* on Decrees (2). We ask in the claim for a mandatory injunction, and that is sufficient ground for our application for a mandamus if the Court should think that the more correct form of relief.

The Defendants say that there are no cases in which an injunction has been granted against a local board for continuing the acts done by their predecessors. The management of the sewers by local boards is a new institution, and it is not to be wondered at if there are but few cases on the point; and if the evil is new, the Court can grant a new remedy. If not, it would be a great hardship to the public. The duty of the local board is to take active measures to abate the nuisance. It is true that it existed at the time of the appointment, but every day that it continues constitutes a fresh breach of duty. It is a continuing nuisance, for which they are responsible: *Attorney-General* v. *Colney Hatch Lunatic Asylum* (3); *Attorney-General* v. *Mayor of Birmingham* (4); *Attorney-General* v. *Mayor of Basingstoke* (5); *Foreman* v. *Mayor of Canterbury* (6); *Hartnall* v. *Ryde Commissioners* (7).

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(1) 6 Ch. D. 731.
(2) 4th Ed. p. 234.
(3) Law Rep. 4 Ch. 146.
(4) 4 K. & J. 528.
(5) 24 W. R. 817.
(6) Law Rep. 6 Q. B. 214.
(7) 4 B. & S. 361. 10 Jur N.S. 257

The power given to the Local Government Board to interfere and compel a local board to do its duty does not oust the jurisdiction of this Court.

In the Court below the question turned entirely on the evidence of nuisance; the legal defence now urged was not then relied on. The fact of nuisance has been established by the evidence, and if we had known that the Defendants would raise the legal defence, we might have obtained evidence that the board had increased the nuisance by their acts.

James, L.J.:—

I am of opinion that, whatever may have led to it, this action was commenced by the Plaintiff through a misapprehension as to what the legal rights and liabilities were—his legal rights against the board, and the liabilities of that board towards him. It is quite manifest, from the form of the claim and the evidence, that the action was not based upon any act whatever done by the Defendants. It is based entirely upon their alleged neglect to perform the parliamentary duty cast upon them as the sanitary authority of a particular district. It is said that this is a very serious matter to the Plaintiff and to the public generally. It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in *England* in any district in which there is any local authority upon which duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not in a similar manner be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would be very much improved. I do not see why, if that is so, every owner of property in *London* which has not received the benefits it ought to have received from a complete system of sewage carried out by the Metropolitan Board of Works might not say, "My court or alley is not properly cared for," and who might not bring an action against the Metropolitan Board of Works or any local board having duties in the district, and why he would not be entitled to bring it on the very day the board was constituted and the duties cast upon it. According to my view there is no sufficient principle to sustain that, and no authority really which comes near it, except the authority of the case before Vice-Chancellor *Hall*, which I will refer to. Let us see exactly how the rights and liabilities stand under the Act of Parliament. By the 13th section all existing and future sewers within the district are vested in the sanitary authority, and vested in them to a certain extent as owners. It is difficult to say whether the exact ownership is the same as it is with regard to the surface of a road as to persons having control of the roads. The sewers, *quâ* sewers, are under their control and vested in them, and by that section alone, as it appears to me, they are under the same liabilities, and have the same defence in respect of any alleged liability, as any private owner of a sewer would have. If the sewer, being in the state in which it was transferred to them, would, independently of the Act of Parliament, give to any landowner or any riparian proprietor a right to an injunction to restrain the use of that sewer, or the abuse of that sewer, it appears to me they would be in the same position as any other owner of a sewer would be. But the case here is not based upon any common law nuisance, or any nuisance existing, or any damage existing irrespective of the neglect of the Act, but upon the alleged neglect to comply with the provisions of the Act of Parliament.

Now, as far as I understand the facts, the greater part of the mischief alleged here is mischief which is caused by the brewery, which, as Mr. *Glasse* says, we know historically to have existed from the time of the siege of *Brentford*, in the time of *Oliver Cromwell*, and which therefore had acquired a legal right apparently that could not have been interfered with. It could only have been interfered with under the 14th and 18th sections of the Act. The rights are to be preserved, if they require preservation. By the 14th section any person who has acquired a right to use a sewer shall be entitled to use the same, or any sewer substituted in lieu thereof, to the same extent as he would or might have done if the purchase had not been made. Then the 18th section provides that the local authority may from time to time close a sewer, " on condition of providing a sewer as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer, and provided that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance." Now, therefore, they were in this position: there were certain persons who were using the sewer. If they were using it unlawfully as against the Plaintiff in respect of his rights of property as they stood before this Act, he had his remedy against them, and was in no way deprived by this Act of Parliament, or anything the Defendants had done or permitted to be done, of any such right. But as to persons who had acquired a prescriptive right to throw into the sewer water or foul matter, so as to affect his property, the local authority could not interfere with their legal right unless by their system of drainage they made a substitute for it. On the other hand, in effecting such drainage they would be liable as any private proprietor would be if any sewer was made or newly used by them so as to constitute what would be but for the Act an actionable nuisance; and that was really all that was determined in those cases to which we have been referred. There are a long series of cases of which *Goldsmid* v. *Tunbridge Wells Commissioners* (1) may, I think, be considered as the principal example. That was a case in which what was done was itself a legal wrong—a legal nuisance, not justifiable or excusable, unless it could have been justified or excused under the Act of Parliament, and it was held that the Act of Parliament did not justify and did not excuse it. The Defendants in those cases, not being able to allege justification or excuse, were put in exactly the same position as any private person would have been, of being restrained—not of having a mandatory injunction to make works or to do anything of that kind, but put under an injunction to restrain the continuance of that which was, independently of the Act, a legal wrong, and not justified or excused by the Act. That will be found to be exactly what occurred in every one of the cases, except the case before Vice-Chancellor *Hall* (*Attorney-General* v. *Mayor of Basingstoke* (2)), in which the same thing may have happened. The facts are not sufficiently stated to enable us to state positively that it was so; but I see no reason to doubt that the Defendants had a sewer vested in them which, according to the view that the Vice-Chancellor took of the facts, would have made them liable for the nuisance in the same way as a private

(1) Law Rep. 1 Ch. 349.

(2) 24 W. R. 817.

owner of that sewer would have been, unless they could escape from the jurisdiction of the Court by reason of their particular character; and what the Vice-Chancellor decided was that they were not entitled to escape from the jurisdiction of the Court by reason of any special character which was alleged as the ground of their immunity. That would be the position of the Defendants in the present case with respect to the transfer of the sewers and the vesting of the sewers in them.

Now, what were the duties the board were to perform? I think the main duty is that which is described in the 15th section, which is, "Every local board shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." Then there are certain powers to take them under carriage roads, and so on, and then comes the 17th section, which I read as being a proviso. It was so expressed in former Acts of Parliament. I read it in the form of a proviso at the end of a section, "Nothing in this Act shall authorize any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse," and so on. That is to say, although they have power to make all such sewers as they think necessary for the district, they must not under that power make or use any sewer they acquire for the purpose of so conveying sewage water. I cannot strike out the first words of this section and say that it is equivalent to saying that they are thereby prohibited from so using the sewers. Supposing there had been a prior Act of Parliament authorizing them to make it, or supposing before this board was constituted their predecessors or they themselves had acquired by actual grant from a man who was the absolute owner of a canal, pond, or lake, or stream of water which nobody but that one proprietor had any interest in whatever, it appears to me impossible to say that this section would avoid any such grant or deprive them of the right they had acquired under such grant. It would be equally impossible to say that it applies to the Defendants in this case, unless they find it necessary to excuse themselves or justify themselves in what they are doing under that Act of Parliament, or that it deprives them of any other defence. Then they are in this position, that they are to cause the whole district to be drained—that is to say, they have no particular duty cast upon them with reference to any particular individuals, but a duty cast upon them for the effectual drainage of the whole district. How is that to be done? It is impossible that can be done except upon some deliberate scheme. It is a system of sewage which is required to be prepared and required to be put into execution. They have practically no compulsory powers. They are to drain the whole district, and their duty is to the district, and the limitation of the exercise of that duty in sect. 17 is a thing that affects not only the district, but any running stream out of the district which may be affected by what they are doing. How are they to do it? It cannot be expected that the local board are to do it with their own hands, or except by employment of labour to be paid for out of the rates of the district. They cannot do it in the air. They cannot do it without going on somebody's property, and it is utterly impossible they could make a single drain or sewer without acquiring property for that purpose.

Then we must consider how that property is to be acquired. By Part v. of the Act they have power to contract for carrying the Act into execution. Sect. 175 says, "Any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease or exchange any lands." Then sect. 176 says, "With respect to the purchase of lands by a local authority for the purposes of this Act, the following regulations shall be observed," and the first subdivision of that section states that the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, shall be incorporated with this Act, with a certain exception mentioned. Then, before they put in force any of the powers of the Act, they must publish once at least in each of the three consecutive weeks in the month of November, in some local newspaper circulated in their district, an advertisement describing shortly the nature of the undertaking in respect of which the lands are proposed to be taken. Now I believe this board was constituted in November, and therefore they could not have done that. Then they are to serve a notice in the month of December on every owner or reputed owner, defining the particular lands intended to be taken. Then they are to present a petition under their seal to the Local Government Board, stating what they are going to do, and then the "Local Government Board shall take such petition into consideration, and may either dismiss the same or direct a local inquiry as to the propriety of assenting to the prayer of such petition, but until such inquiry has been made no provisional order shall be made affecting any lands without the consent of the owners;" and then, "after the completion of such inquiry, the Local Government Board may by provisional order empower the local authority to put in force, with reference to the lands referred to in such order, the powers of the Lands Clauses Consolidation Acts, with respect to the purchase and taking of lands otherwise than by agreement." Then it provides "That the notices required to be given by the Act in the months of November and December may be given in the months of September and October, or of October and November; but in either of such last mentioned cases an inquiry preliminary to the provisional order to which such notices refer shall not be held until the expiration of one month from the last day of the second of the two months in which the notices are given." The real truth is that they are put in exactly the same position as any company is which requires to get the compulsory clauses. An ordinary company is obliged to get its own special Act of Parliament. These bodies are able to get the substitute for an Act of Parliament, that is to say, an order of the Local Government Board authorizing them to acquire the lands compulsorily, they being satisfied of course that the whole thing is right. They cannot make them do anything of that kind until they have made a scheme which they can submit to the Local Government Board, and you cannot say that these persons were guilty of neglect up to the month of May, when the action was brought, because, being only elected in the month of November, they were absolutely powerless to comply with the sections which I have referred to.

Therefore it appears to me that they were not guilty of neglect; but if they had been guilty of any refusal, such as is necessary for the purpose of applying for a mandamus, or any *malâ fide* delay—for it must be brought up to that to make it equivalent to a refusal to take steps—if anything of that kind had occurred, that is not the ground of an action by any proprietor in the district who may be deprived of the benefit he expected to derive from the performance of that duty. If the neglect to perform a public duty for the whole of the district is to enable anybody and everybody to bring a distinct action or to file a distinct claim because he has not had the advantages he otherwise would be entitled to have if the Act had been properly put into execution, it appears to me the country would be buying its immunity from nuisances at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening such a door to litigious persons, or to persons who might be anxious to make profit and costs out of this Act of Parliament. It appears to me the only remedy would be by an application for a mandamus. This suit is not, in substance or in form, an application for a mandamus. It is said to be an application which shall have the effect of a mandatory injunction; that is to say, the application is in form to restrain the Defendants "from permitting sewage or water polluted with sewage or other offensive matter to pass through the drains or channels under their control into the river *Crane* in such a manner as to render the water of the river" injurious to the Plaintiff. That would be a proper injunction to restrain them from doing that which would be wrong if the thing itself were legally wrong, independently of the neglect to make an effectual system of drainage. Under colour of that it is said that we ought to grant what would be a mandatory injunction which would operate as a mandamus to compel them to take all the steps necessary for putting in force the provisions of this Act of Parliament. I am of opinion there is no ground for that. We are dealing with a matter of Chancery jurisdiction, and the Court of Chancery never granted a mandamus to a public body to compel it to do things for the benefit of private persons who might be benefited thereby. A mandamus to compel a man to erect a building was never granted except, I think, in one case, where a railway company, after severing a man's land, did not make a bridge. That was almost the only exception. A mandamus might, on proper evidence of refusal, of which I see none here, be applied for in the Queen's Bench Division in the exercise of its great

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prerogative jurisdiction to compel all bodies having an authority under an Act of Parliament to perform the duties the Legislature had imposed on them. That mandamus might be applied for by any individual who could shew a sufficient cause, and the Court might grant it if it could see that something the public body ought to do was neglected to be done. The statute that has created the duty in this case has by the 299th section given a very special provision for enforcing it—a provision which is very material in considering what the Court ought to do—it gives power to apply to the Local Government Board, and if they think the local authority has made default in providing the district with sufficient sewers, or in maintaining the existing sewers, or in providing the district with a supply of water, and so on, they can apply for a mandamus, or they may appoint some person (which is a very special additional power) to do the duty and to order the costs of doing that duty to be provided for at the expense of the district by its own authority. There is that remedy given which seems to me to make the whole system tolerably complete. I think myself the Court ought to hesitate a great deal before it interferes with respect to a wrong done to a whole district, when the remedy provided by the Legislature would be quite sufficient for the purpose. These provisions of course do not oust the jurisdiction of any Court, either the old Court of Chancery or any Division of the existing High Court, in the case of any legal wrong done; I use that word as distinct from neglect to perform the new duties imposed by this Act. If this board were to create a nuisance which they were not excused from—if they were, in the apparent exercise of their duties, using or making a sewer which would convey sewage or filthy water into any natural stream or watercourse, or any canal, pond, or lake, that would not prevent the jurisdiction attaching which existed before, or prevent it being exercised to remedy the wrong being done. That is the case of an actual public wrong accompanied with special damage, such as in those cases at common law where actions for damage have been maintained against such bodies. If the same thing had occurred here—if this Local Board, while exercising its duties and rights under this Act of Parliament, were to make a hole or cut a drain in a public thoroughfare, or put a heap of stones or drain-pipes, unlighted, as in the case of *Foreman* v. *Mayor of Canterbury* (1)—I say if anything of that kind were done, and damage arose which could be attributed to the unlawful neglect of the persons they employed, they would be liable for it, just as any person making a hole and not sufficiently lighting it, or putting a heap of stones and other matters, and not sufficiently warning people against it, would be liable for it. But those cases have no application to this case, where all that can be alleged against the Defendants, even if the allegation were sustained, which does not appear to me to be the case, is, that they have not, within a reasonable time, performed the public duty which they owed, not to the Plaintiff, but to the district in which the Plaintiff is one of the inhabitant landowners. The only case the Plaintiff has alleged or attempted to prove is that he has not been relieved from a damage to which he was subject before this body were called into existence in the way he hoped to be, and as he would be if they had done their work in draining this district.

Under all these circumstances, I am of opinion that the order of the Vice-Chancellor cannot be sustained, and that the action was brought upon an inaccurate view of the relations between the several landed proprietors in the district and the local sanitary board.

BRETT, L.J.:—

It seems to me in this case that the Defendants have not been guilty of any wrongful act, and they have not been guilty of any neglect which gives the Plaintiff a right to any remedy of any kind. But if they have been guilty of any neglect, the proper remedy has not been asked for, neither has the proper Court been applied to. I should be very sorry to hold that this river was not in a very unsatisfactory state, and in a state which gives reasonable cause of complaint to the Plaintiff. There was conflicting evidence in the matter, but looking to the correspondence which took place between the parties, and looking to the report made to the Vice-Chancellor by Colonel *Hope*—which it seems to me was only a report, and not a binding decision, and which we might therefore have disregarded, but which we ought not to disregard unless convinced it was wrong—I should be very sorry to disagree with the Vice-Chancellor in his holding that there is a substantial grievance affecting the Plaintiff with reference to the state of this river. On the contrary, it seems to me to be made out as a matter of fact that the drainage of the district is in an unsatisfactory state, and in a state which requires remedying. I should also be extremely sorry to hold that it is not the duty of the Defendants to cure this unsatisfactory condition of drainage of the district; for it seems to me that the Act of Parliament imposes upon them that duty. I think that the duty is imposed upon them by the 15th section of the *Public Health Act*. In my opinion no district can be said to be satisfactorily drained, or effectually drained for the purposes of that Act, where any part of the drainage of the district causes a nuisance, so that if the drainage running through any open ditch or stream causes that ditch or stream to be offensive, then as long as that state of things exists it seems to me the district cannot be said to be effectually drained for the purposes of the Act, which purposes are that the district may be in a sanitary condition. I agree with my Lord that the 17th section would not impose any obligation upon them on the mere ground that they allowed sewage to run into a stream or pond without having freed the sewage from excrementitious or other foul or noxious matter. But I still do think, taking the 15th, the 17th, the 19th, the 91st, and the 92nd sections together, that although the owner of the stream or pond could not object to the mere fact of their draining sewage into his stream or pond, yet if the sewage runs into a stream in the district so as to make that stream offensive and dangerous, that district is not effectually drained, and that the local authority would be omitting to do their duty if they did not drain it. These Defendants therefore are, as it seems to me, in this position: they have a district which is not effectually drained within the statute; they are bound, and were bound, to cure that defect, among other instances, with this result, that they should prevent the River *Crane* from being offensive to the inhabitants of the district, and among others, to the Plaintiff. They have a duty to perform; and they have certain powers given to them by and through which they are to perform that duty. But it is obvious that the remedy they are called upon to apply is one of the utmost difficulty. They have under their control only one district. They are not to be allowed to drain into a running stream so as to make it offensive, and they are not to be allowed to drain into the *Thames* so as to make it offensive, and they have no right to make any works which shall create a nuisance to any individual, and yet it is said that they are to effectually drain their district. How are they to do it? Where are they to take the sewage? I agree with what has been suggested, that it is most difficult for them to do it, although perhaps not impossible, unless they can make arrangements with the authorities of other districts so as to have some combined effort by which to get the sewage away to some considerable and safe distance. They therefore have a duty to perform, but a very difficult duty, and one that must naturally therefore require a considerable time, and anybody who has to deal with them, in finding fault with the ineffectiveness of what they have done, is bound to look at their conduct with the greatest indulgence.

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(1) Law Rep. 6 Q. B. 214.

Now, it seems to me to be made out in fact that they have never refused to endeavour to perform the duty which is imposed on them. They have never absolutely refused, but, on the contrary, they have always when challenged admitted their duty, and have answered that they were endeavouring to perform it. There has been no refusal to perform their duty. Then, has there been any neglect so great as to enable anybody to say that by negligence—by continuous and long negligence—they are shewing that they are really refusing to perform their duty, although they do not refuse expressly? Taking into account the difficulty of their position, and the magnitude of the operations they must perform, it would not be right to say that even up to the time of the hearing they have been so negligent as to enable any Court to say they were refusing to perform the public duty imposed upon them.

Under those circumstances what is their position with regard to the law? They have done no act. It is suggested it might have been proved they had done some act, and it was said the Plaintiff was taken by surprise. I cannot accede to that argument. It seems to me that the statement of claim is founded upon an allegation that the Defendants have merely neglected to carry out the purposes of the Act, and the very statement of claim, which must have been made before any act of the Defendants that could mislead the course of the litigation had occurred, assumes that the Plaintiff could not state any act done by the Defendants which was a wrongful act, but that the claim of the Plaintiff was founded solely upon a neglect by the Defendants to perform their duty under the Act; and it seems to me that the statement of defence makes the main defence of the Defendants in this case that they had never refused to perform their duty, but, on the contrary, had always been endeavouring to perform their duty. So that they accepted the charge made against them in the statement of claim to be a charge of refusal or neglect to perform their duty, that is to say, in the statement of defence they have set up the very defence for which they have argued throughout this long discussion. The Defendants having done no act, it seems to me that the Court of Chancery has never, without some act done by such a body as this, granted what is called a mandatory injunction against a public body in order to force them merely to enter upon and to do their duty. There was a long list of cases cited to us the other day; I watched them carefully, and there was not one of them in which the Defendants had not done an act which had caused an injury to a private individual, and which act was unjustified by any statute, and which was such an act as, if done by a private individual, would have given a cause of action at law. That being so, and that being done which might have given a claim for damages in a Common Law Court, the Court of Chancery in those days had given the larger remedy which they had the power to give, and which the Common Law Courts had not. A Common Law Court could only give damages, but the Court of Chancery could not only give damages if they thought right, but either with damages, or instead of damages, they granted a mandatory injunction against the Defendants, directing them to cease from continuing the act which was a wrongful act against the individual. That is the proper function of a mandatory injunction, as it seems to me, and they never gave it in any other case. To-day some additional cases were cited. The case of *Foreman* v. *Mayor of Canterbury* (1) was cited, but that comes within the category of all the other cases. In that case the servant of the

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Defendants first of all placed a heap of stones on the highway, and then left that heap of stones without being lighted. There is an act done, but an act done which he was entitled to do, namely, the laying of the heap of stones on the road if he did it with reasonable care; but he did it without reasonable care, because he left it there in the dark without being lighted. That obviously would give a cause of action. The case in which no act was done, and where it was mere negligence, unless it can be said that was so in the case before Vice-Chancellor *Hall*, was the case of *Hartnall* v. *Ryde Commissioners* (1). That was an exceptional case. Lord *Blackburn*, one of the Judges, put it upon the statute which imposed that duty, and which statute not only imposed on those Commissioners the duty to keep the highway in repair but contained an express enactment that if they did not they should be liable to an indictment. He founds the judgment upon that, and finding that in the statute, he applies the well-known common law rule that if people do that which, as against the public, amounts to misdemeanour, and lays them open to an indictment, and if, besides the injury to the public, they so do it as to do an injury to a private individual, that individual may maintain an action for damages for the breach of the statutory enactment which lays them open to an indictment. That is an exceptional case.

Now, with regard to the case before Vice-Chancellor *Hall*, *Attorney-General* v. *Mayor of Basingstoke* (2), my impression is that the predecessors of the Defendants in that case had been the people who diverted sewage into artificial sewers, and by those artificial sewers diverted sewage into the drain which belonged to the Plaintiff. If so, their predecessors had done an act which would bring the case within the ordinary principle of all the other cases, and probably in that case there was some enactment that carried down the obligation of what their predecessors had done to the Defendants, and so made the Defendants in that case liable also under the ordinary rule. So, indeed, I am inclined to think that in the present case, under this statute, if the former board had done an Act that would have given the Plaintiff a right to damages or to some other remedy, and the effect of that Act

(1) 4 B. & S. 361. 10 Jur NS 257

(2) 24 W. R. 817.

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continued in the Defendants' time, the Defendants would have been liable for the continuance of the consequences of that Act, and would have been liable to an injunction. Therefore it seems to me that the case is not brought within the rule that would enable the Court of Chancery to grant a mandatory injunction.

Then it is said that nevertheless the Defendants are liable to a mandamus to do their duty. Now, supposing they had neglected or refused to do their duty, then I think they would have been liable to a mandamus, but not to a mandamus to be granted by the Chancery Division. It would have been a prerogative mandamus, as it is called, to them as a public body to enter upon and do their duty. That, as it seems to me, under the *Judicature Act* as it was before, is a remedy that can be granted only in the Court of Queen's Bench. I think the mandamus spoken of in the 8th sub-section of the 25th section of the *Judicature Act* is not the prerogative mandamus, but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie. Therefore, supposing the Defendants here had refused to enter upon or to perform their duty, they would have been liable to a mandamus, but only to mandamus granted by the Court of Queen's Bench, and not here. It seems to me their conduct has not laid them open to such a mandamus. They have never refused to perform their duty; they have done acts towards performing their duty; they have not been guilty of any such negligence as amounts to a refusal to enter upon the jurisdiction that is given them; and, therefore, even if a mandamus could have been asked for from this Court, there are not materials on which the Court ought to grant a mandamus. In every view, therefore, I think the Defendants are right. I doubt whether the point which has been so long argued before us was really argued before the Vice-Chancellor, or that we are overruling any formed opinion of his. If we are, I am sorry, with great deference, to differ, and to say that here I think the Plaintiff has made no case for any legal remedy whatever.

Cotton, L.J.:—

The Plaintiff in the present action bases his case upon this, that a stream running through his grounds is in such a state as to be a nuisance, and in consequence of that he asks for relief against the Defendants, not by way of damages, but for a decree which will relieve him from the nuisance he complains of. I agree with Lord Justice *Brett* that, as regards the question of fact, if the right of the Plaintiff would follow our decision on that, he has made out his case; that is to say, he has shewn, in my opinion, that the water in this stream is in such a state that if that were the result of an action of an individual or a body not having Parliamentary authority to put the stream into such a state, or to do acts which necessarily brought the stream into that state, he would have a ground of action against them. But although that is established, it is a very different thing and a very different consideration whether as against these Defendants he is entitled either to the decree granted by the Vice-Chancellor or to any decree in this action.

The decree made by the Vice-Chancellor went beyond what has been considered in the argument, for the decree was against the Defendants, restraining them from causing or permitting any sewage to go into the River *Crane*, and also from causing or permitting any new outfall or sewer for the conveyance of sewage into the River *Crane* to be made. Now, in this case there is no evidence at all, as I understand it, that they have expressed any intention to make any new sewer which would have the effect of bringing fresh sewage into the *Crane*, nor was there anything to shew that they had before the commencement of the action, or at any time by their own act in any way brought any fresh sewage down the existing sewers which go into the River *Crane*, and I think that part of the decree to which I have referred which restrains them from causing or permitting any new outfall to be made must have got into the decree *per incuriam*, without the attention of the Vice-Chancellor being directed to it. I advert to that for this reason, that it must not be supposed, although I concur in thinking that the Plaintiff is not entitled to any decree, that I am of opinion (or that the rest of the Court are of opinion) that the Defendants have a right under this Act of Parliament to make any new sewer, and thereby to conduct any fresh sewage matter into the River *Crane*. In my opinion, if they were

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intending to do so, or had done so, there would be a clear case on the part of the Plaintiff for an injunction against the Defendants, because that would be within the clear prohibition of the Act of Parliament. The decree against them in substance, no doubt, was intended to be a decree against them to restrain them from permitting any sewage to go into the River *Crane.* It is not said they have done any act the consequence of which has been to bring the sewage down to the River *Crane.* If that were so, unless they could shew that in doing that act, and so causing a nuisance to the Plaintiff, they are protected by the Act of Parliament, it would be the duty of this Court, as it has done in many cases already, to restrain the Defendants from creating a nuisance, and although they are a public body, having public duties and powers to perform those duties, that would not exempt them from legal liability in consequence of a nuisance caused by them. On the evidence there is no ground for saying they have done that. I shall have to refer to the cases on the point on another part of the case, but it is sufficient to say here that those cases for the present purpose may be disregarded. It is not the act of the Defendants that has caused any nuisance to the Plaintiff.

Then it is said that although the order has been made in the form of a mandatory injunction to restrain them from permitting the sewage to fall into the River *Crane,* that is done to enforce obedience to obligations imposed by the Act under which they are constituted. Now it is necessary to consider what the duties imposed by the Act which the Plaintiff seeks to enforce are, because the considerations would be very different if the Act of Parliament, either directly or indirectly, contained that which amounted to a prohibition against them from doing a particular thing of which the Plaintiff complains as causing him a nuisance. In fact that was felt by the counsel for the Plaintiff, who contended that there was in this Act of Parliament that which amounted to a prohibition, either in the form of a direction or in the form of a prohibition, against their allowing any sewage to go down into the River *Crane.* Let us see whether there is any such prohibition. For the purpose of convenience, I will take first of all the 19th section, which is the last of those referred to on this point: "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance injurious to health, and to be properly cleansed and emptied." I may dismiss that clause in a word. The complaint here is, not that injury is caused to the Plaintiff by sewers constructed by the Defendants being improperly constructed, or by their leaving sewers not constructed by them in a state to be offensive to him and injurious to his health, but that the sewers are constructed in such a way as, independently of their being in a good or a bad state, to bring down sewage into his stream. The complaint, therefore, is of the way in which the sewer brings down sewage, and not of the state of the sewers. That section, therefore, has nothing to do with it. Sect. 17 was more relied upon. Lord Justice *James* has already referred to that section. It begins thus: "Nothing in this Act shall authorize any local authority to make or use any sewer," and so on. That is not a prohibition, but it is a direction that nothing in the Act is to be supposed to give them the power of doing that which is afterwards mentioned in the section, it is not to authorize any local authority to make any sewer, drain, or outfall for the purpose of bringing sewage or filthy water into a running stream. It is said they were using it by permitting it to be used. I cannot agree to that. "Making or using a sewer" means that you must not make a sewer which brings down the sewage into the river; you must not use existing sewers for bringing into a stream sewage which you by other means bring into the old sewer. The answer to the whole argument on this section is, that it is not directory of what they are to do, before they exercise the power given by the Act, but only that in exercising the powers given by the Act they are not to continue that particular form of nuisance.

We then come to sect. 15, and upon that the question must turn: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." I think I must respectfully differ a little from what has been said by Lord Justice *Brett* as to this section. I hardly think that this can be considered as a direction that they shall make sewers for the purpose of diverting from running streams any sewage that then went into them. It is a direction that they shall effectually drain their district, that is, they shall provide drainage for every house in the district. They are to provide sufficient and proper drains for the purpose of carrying off all the sewage and other matter that is to go through the district; and no doubt doing that in a proper way will have the consequence of making a series of drains and a system of drainage which will result in not allowing any sewage to go down into the running water and the natural streams that there are in the district. That is the result of effectually draining a district by a proper system of draining, and not the consequence of anything in the Act that can be looked upon as a direction that they shall divert from the streams sewage then going into them. I ought to advert to sects. 91 and 92, which refer to the abatement of nuisances. In my opinion those sections have no bearing on the present question. They provide that they are to inspect their district, and to see what individuals in it are doing acts which are nuisances as there defined, and then to take proper proceedings, and a summary remedy is pointed out to oblige those individuals to abate the nuisance; and power is given to the board to remove it themselves if the individuals do not do it.

What, then, is the result? By this decree the Plaintiff says, "I am directing and causing the Defendants to do their duty under the Act of Parliament, not by restraining them from infringing a direct prohibition in the statute, but I, indirectly, by this injunction, by restraining them from allowing the sewage to go into my stream, am compelling them effectually to drain their district, which it is their duty to do, and which is the only means of diverting the sewage from my stream." Putting aside for the present the difficulty of doing such a thing by means of an injunction of this nature, I will deal with it as if it were a question of a mandatory order, that is to say, a mandamus in the sense of a decree directing the Defendants to perform the duties and obligations thrown upon them by the Act of Parliament in which the Plaintiff has a special interest. Ought we to do that unless we can see either something definite which the Court can direct the Defendants to do, or some way by which they can carry out that scheme of drainage—some practical way of carrying out

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that scheme of drainage by which the Plaintiff will, he says, benefit? In my opinion we ought not to do so. We are asked to make a decree something in the nature of a decree for specific performance, and the Plaintiff comes and says, "If you, the Defendants, will do your duty, the result will be a consequential benefit to me particularly, and therefore I have a right to call upon you as if it were a private claim I had against you to perform your duty, and to give that benefit to me." Granted. But it would be contrary to the course of the Court to make a decree of that nature against the Defendants unless the Court is satisfied that there is some particular mode by which they can carry into effect this scheme of drainage, and in that way exercise the powers of this Act of Parliament. But it was said, and for that purpose I must refer to the class of cases much quoted in argument, that this is not the way in which the Court of Chancery has dealt with cases of this sort, where a public body has been brought before it by an individual, or by the Attorney-General, complaining either of a private or public nuisance, and it was argued that in those cases the Court of Chancery has said it has nothing to do with the question how these bodies can perform the duty of draining the district which the Act has thrown upon them, all the Court had to do was to relieve the Plaintiff from the nuisance. But in those cases the complaint was, not that the Defendants were not carrying into execution the powers of drainage, but that the Defendants had caused a nuisance which they attempted to justify as done in the execution of their duties under the Act. The answer was, No; the Act gave you for the purposes of a particular district certain powers of drainage, and certain obligations to have a system of drainage; but it also said that in doing this you should not create any nuisance, or that you should not do what you are doing, namely, draining the sewage into a stream. It was no answer to the Plaintiff complaining of a nuisance not justified by the Act of Parliament to say that those Defendants had under the Act of Parliament a duty which they were to perform without causing a nuisance. If once the act has been established to be a nuisance, and not within the protection of the Act of Parliament, it is no answer to the Plaintiff to say, "We are doing this in discharge of a duty," when the Act of Parliament which gave them the power and obligation of discharging that duty for the benefit of other persons had expressly reserved the right of the Plaintiff complaining and prohibited any act being done to his prejudice or wrong. Therefore the Court said, "We have nothing to do with the question how you are to perform the duties imposed by the Act; you have your powers on condition of not doing a wrongful act; the act is wrongful, and therefore is not protected by the Act of Parliament; and you must be treated just as if you had no Parliamentary powers." Therefore those cases are out of the question. Here it is not that the Defendants have done a wrongful act, and that they are seeking to protect that wrongful act by saying that unless they do it they cannot do something else, but the Plaintiff asks that they may be called upon to exercise the powers of this Act, because that will relieve him from nuisance and injury—an injury not done by the act of the Defendants, but which existed before the Defendants came into existence. Those cases are not at all authorities for the suggestion that we should make a mandatory decree without seeing that there is a practical mode of carrying into effect the powers given by this Act of Parliament. Moreover, in my opinion, no branch of the High Court ought to direct the Defendants by its decree to exercise powers and to do their duty without being satisfied that there has been something in the nature of a refusal on the part of the Defendants so to do their duty and to comply with the obligation of the Act of Parliament. Here there has been no refusal, and the delay of the Defendants was only from November, when they were constituted, till the month of July, when the action was brought.

Then it is said, one may take into consideration the delay of the previous local board, and attribute that to the present Defendants. For that purpose sect. 12 of the Act was relied upon. Without looking at the special words of the section, it is obvious it could not be intended to apply to such a case on any fair construction. The previous local authority had to exercise the powers given to them by the then existing Act, under which they were then constituted, and over a different area. The present board have to exercise powers under this Act of 1875 over their area, and how can neglect to perform duties imposed by the Act of

1848 or of 1872 be neglect to perform the duties created by the Act of Parliament of 1875 in a body existing only under that Act, and having duties to perform specified and defined by that Act. Section 12 comes to this, that as regards the property vested in the *Brentford* Union, the Defendants take it subject to all the obligations and liabilities imposed upon it while under the control of the former authority; and if the former body had by any act done by them given a right of action, or incurred any liability—if by any contract they had incurred any debt, or if they had come under any obligation capable of being enforced by action, then that could be enforced in the same way as if they were still the same persons who entered into the contract, or incurred the obligation. It cannot be said that delay, if there were delay, on the part of the old board, can be imputed to the present board, so as to make it a refusal to exercise the powers given by the Act of Parliament.

There are two other points. This is not a decree to direct the Defendants to perform certain duties imposed by the Act of Parliament, but it is a decree in the form of a mandatory injunction. In my opinion, if the Court can order the Defendants to carry into execution the powers given by the Act, it ought to do so directly, and not to do so by restraining them from permitting a thing to be done which it is not clear will necessarily be removed by their exercising the powers given by the Act. It certainly ought to direct them to exercise the powers of the Act, and not to put them under an injunction for breach of which there might be sequestration, by enjoining them from permitting a thing to continue which they may not have power to remove.

There is one other matter which I may refer to, although Lord Justice *James* referred to it, because I think Mr. *Glasse* did not quite see the point which I put—I mean with regard to sect. 299. That section provides a mode by which steps shall be taken to compel a public body to discharge its duties under the Act. It cannot be said that that section could have taken away any jurisdiction, either to grant damages, or an injunction, if the act was one which the Plaintiff could complain of as a legal wrong done to him; nor do I suggest that the existence of that section takes away the power of the Court to interfere by

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decree to compel the Defendants to do their duty. But when it is at least doubtful how this scheme can be carried into effect, and the Local Government Board have great control over the manner in which the scheme is to be carried into effect, and may say whether it is done reasonably or not, the existence of sect. 299 may, in my opinion, influence the Court in deciding whether it will make a decree against the Defendants. On all these grounds I am of opinion the Plaintiff fails, and the action must be dismissed.

On the question of costs,

JAMES, L.J., said:—I think there is no sufficient ground to alter the general rule that the costs must abide the result. The Defendants will have the costs of the suit in the Court below and here. There was a defence that there was no nuisance, and that the river was not in such a state as to cause discomfort to the Plaintiff. But there was also a defence that the Defendants had done nothing in their time to cause a nuisance, and that anything that exists there has existed for twenty years, so that there is a common law presumption against the action. It appears to me that they have succeeded upon that point, and that the great bulk of the evidence was directed to that.

Solicitors for Plaintiff: *Young, Jones, Roberts, & Hale.*

Solicitors for Defendants: *Pyke, Irving, & Pyke,* agents for *Briggs, Isleworth.*

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Vendor and Purchaser—Conditions of Sale—Misleading Condition—Sale by Court—Conveyancing Counsel of Court—Form of Order when Condition held misleading.

A condition of sale is bad as misleading, 1, if it requires the purchaser to assume what the vendor knows to be false; 2, if it states that the state of the title is not accurately known when in fact it is known to the vendor.

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— 533, 541
14 Ch D 25
— 278
7 App Cas
24 — 5
24 Ch D 14

At a sale of the fee simple of a farm under the order of the Court there was a condition that a declaration by the tenant should be produced to the purchaser that the farm was taken by him from *E.* in October, 1835, and had since been held by him of her and those claiming under her in succession. The condition provided that the purchaser should be satisfied with the title so made, without the production of any document previous to the will of *E.* in 1860, who should be assumed to have been seised of the property in fee simple in possession, free from incumbrances, in October, 1835, and up to and at her death. The condition further stated that it was not accurately known, and could not be satisfactorily explained, how she acquired the property, and it was expressly stipulated that no other title than as above should be required or inquired into.

The purchaser, after an abstract of title in accordance with the condition had been furnished to him, discovered that *E.* was a mortgagee in possession and had no title against the mortgagor except under the *Statute of Limitations* by adverse possession commencing in 1844; and that her executor in 1861 had paid legacy duty on the mortgage debt, and not succession duty on the estate. These facts were well known to the vendor:—

Held (reversing the decision of *Fry*, J., on fresh evidence), that the condition of sale was a misleading condition, and that the purchaser was entitled to have a good holding title notwithstanding the condition, or else to rescind his contract.

The conveyancing counsel of the Court must be treated as the agent of the vendor as between the vendor and the purchaser.

Where the conditions on the face of them purport to give only a good holding title, the purchaser on being relieved from them is not entitled to have more than a good holding title.

SUMMONS by a purchaser of property sold under an order of the Court to rescind his contract.

The action was brought for the administration of the estate of *Lucy Banister*, a widow, who died on the 11th of February, 1877,

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having by her will devised all her real estate to the Defendant *F. H. Munton* in trust for sale, and appointed him sole executor.

On the 18th of June, 1878, a farm called *Franklands Farm*, and some adjacent woodland, situate in the parishes of *Wivelsfield* and *Lindfield*, in the county of *Sussex*, were put up for sale by auction in two lots, in pursuance of an order of the Court made in the action. The sale was made subject to certain conditions which had been settled by one of the conveyancing counsel of the Court. *G. E. Cockayne* became the purchaser for the sum of £4250, and signed a contract for the purchase, paying a deposit of £500.

The 10th condition of sale was as follows:—

"A declaration will be produced and handed over to the purchaser that the farm mentioned in the particulars of sale was taken by the declarant of *Esther Banister* in October, 1835, and has since been held by the declarant of her, and those claiming under her in succession, to the present time, and the same declaration will state that the adjoining wood mentioned in the particulars has been enjoyed as one property with the farm for the like period; and each purchaser shall be satisfied with the title so made as shewing a good and sufficient title, without the production of any other document of title whatsoever previous to the will of the said *Esther Banister* in 1860, who shall be assumed to have been seised of and entitled to the entire property in fee simple in possession, free from incumbrances, at the time of letting the farm in 1835, and up to and at her death. It is not accurately known, and cannot be now satisfactorily explained, how she acquired the property, and it is expressly stipulated that no other title than as above shall be required or inquired into, whether in the vendor's possession, power, or knowledge, or not, neither shall he be bound to answer any requisition relative thereto. If any liability to succession duty shall appear, the same shall be settled or provided for as the Court shall direct."

The vendor, who was himself a solicitor, prepared a statement of the title as it appeared from the documents in his possession, which he laid before the conveyancing counsel of the Court. It appeared from this statement that the property originally belonged

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to *Thomas Burrell*, who died in 1790, having by his will devised it to Mrs. *Montero* for life, with remainder to her children who should survive her. Mrs. *Montero* had two daughters, who joined with her in 1822 in mortgaging the estate to *John Banister*. *John Banister* died in 1825, having by his will bequeathed the mortgage on the *Franklands* estate to his three daughters, *Esther*, *Elizabeth*, and *Susannah*, charged with legacies to his other two daughters, *Mary Ann* and *Harriet*. His daughter *Esther Banister* proved his will as his sole executrix. *Elizabeth* and *Susannah Banister* subsequently died, having by their respective wills given all their property to their sister *Esther*.

Mrs. *Montero* died in 1844, having survived her two daughters, and it was not known who was the heir-at-law of *T. Burrell*, to whom the equity of redemption appeared to have descended. *Esther Banister* was in possession of the mortgaged estate at the time of Mrs. *Montero's* death, and remained in possession till her own death in 1861.

The abstract of title furnished to the purchaser did not disclose any of these facts. It commenced with the will of *Esther Banister*, dated the 24th of August, 1860. She devised all her real estate to her brother *Thomas Banister*, and appointed him sole executor. *Esther Banister* died on the 3rd of December, 1861, and on the 13th of September, 1867, *Thomas Banister* executed a settlement upon his marriage, by which he settled the *Franklands* estate upon certain trusts under which his wife *Lucy Banister*, the testatrix, became, after his death, absolutely entitled to it.

The purchaser's solicitors made (among other requisitions on the title) one which pointed out that succession duty ought to have been paid on the death of *Esther Banister*, to which the vendor's solicitors answered that the receipt for succession duty on her death did not include the property the subject of the sale. The purchaser's solicitors then made inquiries at the Inland Revenue Office, and received in reply a letter from the office which informed them that it did not appear that *Franklands Farm* and *Wood* had been accounted for as forming part of the property of *Esther Banister*. This letter was forwarded to the vendor's solicitors, who on the 12th of September, 1878, replied: "With regard to the succession duty, it would appear that at the time of the death of Mr. *Banister's* predecessors a prescriptive title to the fee had not matured, and, if this be so, we submit that no succession duty was payable." The purchaser's solicitors replied that this was the first intimation that the vendor only claimed a prescriptive title to the property. After some further correspondence a summons was taken out in the action by the purchaser, asking that the question of succession duty might be settled by the Court, and on the return of that summons before the Chief Clerk on the 9th of November, the vendor's solicitors for the first time stated that *Esther Banister* was a mortgagee in possession of the property, and that legacy duty had been paid upon the amount of the mortgage debt by her executor on passing his residuary account. The hearing of the summons was adjourned to enable the vendor's solicitors to produce that account. The purchaser's solicitors then made a search of the records of the Court of Chancery, and they discovered that in the year 1845 a suit had been instituted by *Esther Banister* as Plaintiff against *William Ellis*, who was a prior mortgagee, and others, as Defendants. The suit was not for the foreclosure of the equity of redemption, but its object was to determine the rights of the first and second mortgagees with reference to the proceeds of a policy of assurance on the joint lives of two then deceased owners of the equity of redemption, which policy had been included in the mortgages. The will of her father, *John Banister*, was referred to in the pleadings, and the purchaser's solicitors obtained an office copy of that will.

On the discovery of these facts the purchaser took out a summons in the action, asking that, having regard to the misstatements as to the vendor's title contained in the 10th condition of sale, the contract might be rescinded, or that an open reference might be directed whether the vendor could make a good title to the property.

The hearing of the summons was adjourned into Court. In consequence of the illness of Vice-Chancellor *Malins*, the action was transferred to Mr. *Justice Fry*.

The statement of title which had been laid before the conveyancing counsel was not called for by the purchaser at the trial, and was not read by the Judge.

The summons came on to be heard on the 28th of March.

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J. Pearson Q.C., and *E. T. Holland*, for the purchaser:—

Having regard to the real state of the title, the 10th condition is misleading, and the proper inference from the evidence, and especially from the letters written by the vendor's solicitors, is, that the vendor was well aware of the real title. At any rate he had the means of knowledge. It is clear that *Esther Banister* was in possession in 1845 as a mortgagee, and in a fiduciary character as executrix of her father's will. She was certainly not absolutely entitled in fee in 1835, as the condition tells the purchaser he is to assume that she was. The *Statute of Limitations* could not have commenced to run as against the mortgagors before 1845, and indeed the bill ought to be treated as an acknowledgment of the mortgagor's title. A vendor is bound to tell all that he knows. Under the circumstances the condition was misleading, and the purchaser is entitled to have the contract rescinded: *Edwards* v. *Wickwar* (1); *Beioley* v. *Carter* (2); *Harnett* v. *Baker* (3); *Jones* v. *Clifford* (4); *Manson* v. *Thacker* (5); *Hume* v. *Bentley* (6); *Waddell* v. *Wolfe* (7).

At a sale under an order of the Court the vendor is even more bound than at an ordinary sale to shew the utmost good faith: *Else* v. *Else* (8); *Edwards* v. *Wickwar*.

Glasse Q.C., and *Buckley*, for the vendor, were not heard.

FRY, J.:—

In this case the applicant asks for the rescission of a contract for sale entered into by him for the purchase of an estate, or, in the alternative, for the delivery to him of an abstract more extended than he is entitled to under the conditions of sale; in other words, he seeks to put the vendor to his election either to furnish a better abstract, or to have the contract rescinded.

There are several things which are quite clear with regard to a contract founded on conditions of sale. One is this, that the

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(1) Law Rep. 1 Eq. 68.
(2) Ibid. 4 Ch. 230.
(3) Ibid. 20 Eq. 50.
(4) 3 Ch. D. 779.
(5) 7 Ch. D. 620.
(6) 5 De G. & Sm. 520.
(7) Law Rep. 9 Q. B. 515.
(8) Ibid. 13 Eq. 196.

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vendor, who means to exclude the purchaser from his common law right to have a good title shewn, must do so by explicit and clear words. Another is, that, if the vendor seeks to exclude the purchaser by a statement of fact, he must prove the fact to be true, and the statement of fact must be an honest and fair one; it must not for the purpose in hand be a part of the truth only; it must, so far as that purpose is concerned, be the truth and the whole truth. It must therefore not mislead an ignorant person. One of the main reasons why the Courts have treated conditions of sale in this way is, that the vendor is a person who knows, and he is stipulating with the purchaser, a person who does not know. It is, therefore, of course fair that the person who does know should express his meaning so as to be perfectly intelligible to the person who does not know. Another thing equally plain is this, that where the conditions of sale are framed in bad faith, so as in effect to trap the purchaser, the Court will not hold him to be bound. It is also perfectly plain that, where the sale is under the direction of the Court, the Court will lean, if possible, to a more exact requirement of good faith and honesty on the part of the vendor; it will endeavour to insist upon that fair, straightforward, honest, open dealing which ought to characterise transactions between vendor and purchaser. Therefore, if it were shewn in this case that there had been bad faith, that there was anything like a trap, if the reasons stated in the condition were false, or, probably, even if it had been shewn that I should be forcing upon the purchaser that which was really no title at all, I should have felt bound to accede to the application. But I find in fact none of those circumstances which would, in my opinion, justify me in releasing the purchaser from the contract into which he has entered.

The controversy arises on the 10th condition of sale. [His Lordship read the condition.]

The purchaser is required to make a certain assumption, and it is expressly provided that he shall be satisfied with the title being shewn in a particular manner. Those conditions are imposed upon him as the result of two things, the one the production of a declaration, the other a certain statement of facts as to knowledge or ignorance. A declaration is to be produced shewing that there was a payment of rent to *Esther Banister* from October, 1835. That is a condition precedent to the assumption being made, and that condition has been performed. Over and above that there is a statement or allegation of fact on which the purchaser is asked to adopt the assumption. Although it follows after the condition it is evidently a condition precedent. The statement is this, "It is not accurately known and cannot be now satisfactorily explained how she acquired the property." Was that statement of fact true? That is a very important inquiry.

Now what I find is this: The vendor was the trustee under the will of *Lucy Banister;* a suit was instituted for the administration of her estate, a sale took place under the direction of the Court. the devisee in trust accordingly laid before the conveyancing counsel of the Court all the documents which were in his possession relating to this matter, commencing with the will of *Thomas Burrell* in 1784. It appeared that *Esther Banister* had become entitled to the real and personal estate of her father, that she was in possession of this land, that in 1860 she made her will, devising all her real and personal estate to *Thomas Banister*, that he entered upon this land on her death in 1861, that in 1867 he made a marriage settlement under which the property ultimately came to his widow *Lucy Banister* in fee, that she entered upon the land, and that in 1876 she died, having enjoyed it during her lifetime. It seems to me that the whole of the information which was in the possession of the vendor, and which appeared to bear upon the title to this real estate, was placed by him before the conveyancing counsel, and that the conveyancing counsel, having had two or three conferences with the vendor, who is himself a solicitor, came to the conclusion that he did not accurately know, and that he could not then satisfactorily explain, how *Esther Banister* acquired the property. That appears to have been a perfectly true and honest statement by the vendor and his adviser. Nor is it altered now after the industry which has been exhibited by the purchaser with a view of getting out of his contract; he has not been able to explain satisfactorily how *Esther Banister* acquired the property, and the manner in which she acquired it is still not known. It appears to me, therefore, that the two conditions upon which the assumption was to be made have been satisfied, viz., the production of the declaration and the truth of the statement as to title.

But it is said that there were circumstances in the knowledge of the vendor from which he must have known that the assumption that *Esther Banister* was seised in fee of the property in 1835 could not have been true, and that no vendor can ask a purchaser to assume the truth of that which he knows to be false. The circumstances, however, do not seem to me to justify that suggestion. It appears to be perfectly true that when *Esther Banister* died in 1861, *Thomas Banister* elected to treat the property as mortgaged property, and to pay legacy duty upon it and not succession duty. But it is, I think, equally plain that that would not in the natural course of things be known to the vendor of the estate, because no person who investigates the title to real estate naturally looks into the account of the residuary estate of a devisor, and, judging from the evidence before me, I have come to the conclusion that the vendor had in fact no knowledge whatever at the time when the conditions of sale were drawn that in 1861 or shortly afterwards legacy duty had been paid in respect of the property. It appears to me, therefore, that there was nothing whatever in the assumption which he asked the purchaser to make which was inconsistent with his knowledge at the time when he asked the purchaser to make it, and therefore there was no want of good faith in imposing that condition.

Is it then clear that the purchaser will obtain no title whatever to the property? On the contrary, it appears to me that in all probability the purchaser will acquire a good holding title (I say nothing about a marketable title), and for this reason, that there is distinct evidence that from the year 1835 the receipt of the rents and profits of the property has been in precise accordance with the statement made. The industry of the purchaser has discovered another fact which does not appear to have been known to the vendor at the time of the sale, namely, that in 1845 *Esther Banister* brought a suit in the Court of Chancery against the first mortgagee and also against the mortgagors, the object of which was to settle the priorities between the first and second mortgagees and to enforce the satisfaction of the first mortgage by means of certain policy moneys which the first mortgagee had received.

That suit, it appears, resulted in the success of the second mortgagee, and the satisfaction, consequently, of a mortgage prior to that under which *Esther Banister* originally claimed. But whether or not that bill amounted to an acknowledgment by her of the mortgagor's title, I do not think it necessary now to determine. It does not appear that the existence of that suit was known to the vendor at the time of the preparation of the condition of sale. But, even if it was, what is the subsequent history of it? A decree which satisfied the first mortgagee was made as far back as 1847, thirty-two years ago, and from that time down to the present the property has been enjoyed by the vendor's predecessors without acknowledgment of the mortgagor's title. That is a title which may very probably turn out to be a perfectly good holding title; at any rate, it is one on which it is impossible for me to conclude that the purchaser will get nothing by his bargain.

Under these circumstances I feel bound to hold that there has been no want of good faith, that there has been no falsity in the statement of fact, that it has not been shewn that there is any trap in the condition, or that the purchaser will not get a good holding title. Therefore I think the case is governed by *Hume* v. *Bentley* (1), and that there is no ground for discharging the purchaser from his bargain. I must refuse this application with costs.

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From this decision the purchaser appealed. The appeal was heard on the 14th of May, 1879.

On the hearing of the appeal the statement of title which had been laid before the conveyancing counsel by the vendor was called for by the Court and produced.

J. Pearson, Q.C., and *E. T. Holland*, for the Appellant:—

The conveyancing counsel is the counsel of the vendor, and the vendor is bound by any misstatement which may appear in the conditions of sale as settled by him. In a sale by the Court a purchaser has a right to look to more perfect good faith as to the title than in ordinary sales. The production of the statement of title prepared by the vendor, which was not seen by Mr. Justice *Fry*, shews more conclusively than before that the vendor knew the real state of the title, and that the purchaser was misled as to the title by the 10th condition of sale. The vendor's title is simply the title of a mortgagee claiming by adverse possession under the *Statute of Limitations*, but the condition of sale conceals the fact of *Esther Banister* being a mortgagee. A vendor may stipulate that the purchaser shall assume a fact which the vendor believes to be true but is unable to prove, but he may not stipulate that the purchaser shall assume a fact which he knows to be false. If he does, the purchaser has a right either to call for a good title independently of the condition, or to rescind the contract: *Edwards* v. *Wickwar* (1). That is what we claim in the present case.

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(1) 5 De G. & Sm. 520.

Glasse, Q.C., and *Buckley*, for the vendor:—

The vendor laid a full statement of claim before the conveyancing counsel, and he is not to be held responsible if the counsel in the exercise of his discretion draws a condition of sale which misleads a purchaser. The vendor was obliged to accept the conditions as drawn by the counsel; therefore the counsel is the agent of the Court, not of the vendor.

But we say that in this case the 10th condition was a fair and reasonable one. A vendor is at liberty to stipulate that the purchaser shall assume any fact that he pleases, whether he believes it to be true or not; it is a mere matter of bargain; and if the condition is a strict one, as in the present case, the purchaser takes it into account in the price he offers. The statement disclosed a good holding title, and that the purchaser will have. But it is unreasonable that a purchaser, having bought under strict conditions and calculated the price accordingly, should force the vendor to shew a good marketable title as though there had been no conditions at all: *Wilmot* v. *Wilkinson* (2); *Hume* v. *Bentley* (3).

JESSEL, M.R. :—

This is an appeal from a decision of Mr. Justice *Fry*, and I must say that there are materials before this Court which were not before the learned Judge in the Court below, and I cannot help thinking that if those materials had been presented to him his

(1) Law Rep. 1 Eq. 68.

(2) 6 B. & C. 506.

(3) 5 De G. & Sm. 520.

conclusion would not have been the same as that to which he came when the case was argued before him.

Now the sole question which it appears to me we have to decide is this, whether this condition was a fair one. I will explain what I mean by that. First of all, no one will doubt for a moment—and the *dicta* on this subject are numerous—that in sales by the Court there should be at least as much good faith shewn towards the purchaser as, and perhaps a little more than, is required by ordinary vendors out of Court. The old Court of Chancery—and this Court is its successor—has always felt bound to see that purchasers are fairly and honestly dealt with in every respect; and if there is any difference—I do not say there is—the difference must surely be in favour of a purchaser who buys under the decree and order of the Chancery Division. Now, in considering the position of the vendor I quite agree that in a case of this kind, where a trustee or *cestui que trust* is under disability, the course of the Court is to require the title to be laid before the conveyancing counsel who settles the conditions, and the solicitor who adopts that course, and fairly gives to the conveyancing counsel all the material facts known to himself, is not in the slightest degree to blame if it should afterwards appear that there has been mistake or miscarriage in the framing of the conditions; and I must say further, that, having read the instructions laid before counsel, I think the solicitor in the case did present to him all the material facts which were necessary to enable him properly to frame the conditions. The miscarriage, if miscarriage there be, I do not in the slightest degree impute to the gentleman who laid the instructions before the conveyancing counsel; but still the conveyancing counsel, though in one sense the officer of the Court, is the conveyancing counsel of the vendor. It is quite true if the vendor institutes an administration suit he is compelled to go to the conveyancing counsel as a part of the proceedings, but it does not at all change the relationship which the counsel stands in to the vendor as between the vendor and purchaser; and therefore if there has been a mistake, in my opinion, as between vendor and purchaser, the vendor is no better off than if the mistake had been made by a conveyancing counsel not appointed by the Court.

The next question to consider is, what is the rule as to representations? I apprehend that the considerations which induce a Court to rescind any contract and the considerations which induce a Court of Equity to decline to enforce specific performance of a contract are by no means the same. It may well be that there is not sufficient to induce the Court to rescind the contract, but still sufficient to prevent the Court enforcing it. Here the purchaser comes to the Court and says, Do not compel me to take a title under these conditions; either give me something more (I will consider in a moment what more) or else let me off the contract altogether. What he complains of is this. He says, I bought under conditions which were not truly framed, which contained representations, either expressed or implied, which are untrue, and were untrue to the knowledge of the vendor at the time those conditions were framed. Now if they were untrue in fact, and the real facts were known to the vendor, however innocent the vendor may be of intentional misrepresentation (for the actual vendor, the trustee, took all the precautions to get the conditions properly framed), still those are untrue representations of the vendor; and therefore if it is shewn that the material statements made, which were either expressly or impliedly made, were untrue, then I think the purchaser could not be held to be bound by the condition—that is, bound to the extent of being compelled to take the title.

There are two grounds of complaint. The first ground of complaint is, that the purchaser is required to assume that one *Esther Banister* "was seised of and entitled to the whole property in fee simple in possession free from incumbrances at the time of letting the farm in 1835 and up to and at her death." The second is this: "It is not accurately known, and cannot now be satisfactorily explained, how she acquired the property." Then there is a stipulation that the purchaser is to make no inquiry as to any other title. It is said, as regards this assumption, that the vendor knew well that *Esther Banister* was not, in the year 1835, entitled to the entire property in fee simple, and that, knowing that well, he ought not to have put in a condition asking the purchaser to assume that she was; because it would inferentially amount to a statement that, so far as he knew anything to the contrary, she was so seised and entitled in fee simple. It appears to me this objection is well founded. I do not think a vendor is entitled to say that the purchaser shall assume that which the vendor knows not to be true. The utmost that can be asked of the purchaser is that he shall assume something of which the vendor knows nothing, but this condition does appear to me inferentially to represent to the purchaser that at all events, so far as the vendor knew, *Esther Banister* was seised or entitled, which was not a true statement.

As regards the second point, if it should turn out that it was accurately known and could be satisfactorily explained how *Esther Banister* acquired the property, that would be an untrue statement of fact beyond question, and if known to the vendor, of course would be an untrue statement to his knowledge. Now in this particular instance it happens that the vendor was the solicitor, and he prepared what I must say is a very concise and clear statement as to the title to be laid before the conveyancing counsel. It appeared by the affidavits that such a statement had been prepared in writing, and I think, speaking with the utmost deference, that Mr. Justice *Fry* should have called for that statement in writing. It is clear it could not be protected, because if you once charge that the vendor knows a fact contrary to that stated in the conditions of sale, and he has in his possession a writing written by himself shewing that he knew the fact, of course that writing is not protected. Now that being so, and looking at this statement, I find this, the *Esther Banister* in question acquired a title in this way. There was one *Thomas Burrell*, who gave the property to a Mrs. *Montero* for life, with contingent remainders over to her two daughters; then Mrs. *Montero* and her two daughters by deed mortgaged the property to *John Banister*. I will say nothing about the other mortgage, which is not material for what I am going to state. *John Banister*, the mortgagee, made this very *Esther Banister* one of his executrixes, and she was the sole person who proved the will, therefore she became the sole legal personal representative of *John Banister*, and, under the conveyance by Mrs. *Montero*, would have become mortgagee of the property for the life of Mrs. *Montero*; and I am told there is a fine, although that does not appear on the face of the case; after Mrs. *Montero's* death there was a contingent fee given to Mrs. *Montero's* daughters. That being so, and it being stated as the case, there is not the slightest doubt or question as to how she became entitled.

What happened next was this—and it is a very singular state of things. The tenant for life—that is, the mortgagor—died in 1844, having survived both of her daughters, so that the contingent fee never became a vested fee, and therefore the ultimate fee descended to the heir-at-law of the original testator, *T. Burrell*, all of which is stated in the case with the greatest clearness, and was, of course, well known. From that time to her own death, in 1861, this *Esther Banister* remained in possession. Can it be said that her title was not accurately known? She got into possession during the life of Mrs. *Montero*, and she remained in possession after her death. Probably the heir-at-law of *Burrell* was not known, because the heir at his death had died a great many years before, namely, in 1790. The great probability is, that in 1844 nobody knew anything about him or his family either, and Miss *Banister* remained in possession. What, therefore, remains to be known about the possession I cannot imagine. It is the case of a mortgagee remaining in possession after the mortgaged estate had come to an end. It appears there was a dispute about the other property mortgaged, and about the policies of insurance, until the Chancery suit; and the result of the Chancery suit, to which the legal personal representatives of Mrs. *Montero* were parties, was, that in 1847 the other property was conveyed to Miss *Banister*. Of course this property could not be conveyed, because it had ceased to be comprised in any of the deeds; and she remained, therefore, in possession simply and solely as a person whose title was not challenged by the true owner, whoever he was.

That being so, it appears to me that the vendor knew, firstly, that in 1835 *Esther Banister* was not seised in fee; and, secondly, knew quite accurately how she obtained the possession. It follows from what I have said that there is a perfectly good title if these facts are proved. Of course since 1844 there has been adverse possession against the heirs of *Burrell*, whatever disabilities they may have been under. I might mention, to shew how perfect the statement of title is, that it appears that *John Banister* left this mortgage specifically to his three daughters, subject to charges in

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favour of two others. It is stated that the charges of the two others are released; it is not of much consequence whether they are or not, as he died in 1825, and the other two daughters who were co-owners with *Elizabeth Banister* have both died and left their property to this lady, so that her title would be complete also independently of the question of the statutes. She devised to one *Thomas Banister*, he devised again, and his devisee sells it. A better title, if that is true, cannot be imagined, and I do not see any ground whatever for not shewing it. That is for the vendor's solicitors to consider.

In that position of matters is it right that we should compel the purchaser to rely on this condition, he having been led to purchase on the assumption, and the fair assumption, that what was stated was a fair representation of the true state of the title? I think it is not, and I think the purchaser is entitled to say to the Court, "Either shew me a title"—I will consider in a moment what title—"or let me off altogether." What title ought to be shewn? As I have already said, assuming that all in the statement of the case can be proved, it appears to me there is a good and marketable title; but that does not at all define the extent of the right of the purchaser. When I come to look at these conditions, it appears to me clear that the purchaser would not say he bargained for more than a good holding title. He is told that his title is to begin with a declaration and a will, and it is not, therefore, such a title as on the face of it would be a marketable title, and he is satisfied to buy under such condition. It does not appear to me that he is entitled to ask for more than it is represented to him he would obtain; and therefore, although I think the reference might well be answered as regards the title that it is a marketable title, the reference should be confined to a good holding title, and the order which we therefore propose to make is this—To discharge the order of the Court below; to declare that the purchaser is entitled to a good holding title notwithstanding the 10th condition, as to which the vendor should have a reasonable time. If the vendor within a fortnight elects to shew that title, then refer it to Chambers to ascertain whether a good holding title can be made out; if not, the contract will be rescinded on the usual terms.

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Now, as regards the costs, I must say it would have been more satisfactory to me if the purchaser had called for this evidence, which he knew was in writing and existed, before the Court below, or if the Judge had directed the document to be produced; and I cannot help thinking this appeal would not have been heard of at all if that course had been adopted. It seems to me it would be right, under all the circumstances of the case, considering the Appellant has now succeeded upon the facts not disclosed in the Court below, to give him the costs in the Court below of the application, and to direct no costs of the appeal. Of course if the contract is rescinded it will be on the usual terms—that the vendor pay back the purchase-money with interest.

BRETT, L.J.:—

I am prepared to say that I can see no proposition of law laid down in this judgment which is wrong, and I can see no conclusion of fact upon the evidence which was presented to the mind of Mr. Justice *Fry* which is erroneous. But it seems to me that there have been facts before this Court which raise a question of law which is not decided or dealt with in the judgment of Mr. Justice *Fry*. It may be—I am sure I do not say to the contrary—that the document which is now before the Court might have been one which Mr. Justice *Fry*, if its existence had been called to his attention, should have called for and seen, and probably one which, if it had been called to his attention, he would have insisted upon seeing.

As the case stands before us, it seems to me that unless the purchaser can do away with some stipulation which is contained in the 10th condition of sale, if he is bound by that in its terms, he has everything to which he was entitled. If the condition of sale had been in contest before a Court of Common Law under the old state of the law, he would have had everything he was entitled to, and could not have asked for more; but I think that the authorities shew that in a Court of Equity that requirement or insistance that a certain state of things shall be assumed does by implication contain an assertion that no facts are known to the persons who require it which would make that assumption a wrong one according to those facts. There is, therefore, an implied repre-

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sentation which arises from the insistance that certain matters should be assumed. There is here another representation in point of fact.

Now, if it had been necessary to hold that there was any want of good faith on the part of the trustee, who was the vendor in this case, nothing should have induced me, with my present knowledge of the law, both at law and in equity, to say that any man is guilty of want of faith, or is guilty of fraud, whatever may be his knowledge of facts, unless I am convinced from that knowledge of the facts that he had a wrong intention in his mind. I do not believe that there is any case which would oblige us to do what to my mind would be such an outrageous thing as to hold that a man is guilty of want of faith or fraud as long as he has an honest mind. I agree entirely with Mr. Justice *Fry* that there was no want of good faith in this case. I agree with him that if there was a want of good faith, that is to say, if a person asked for an assumption of this kind, knowing at the time facts which made it wrong to ask for that, and with an intention to deceive, then I agree with all my heart that the condition should not be held binding. But where there is no want of good faith it seems to me that it would be an outrage to ask one to hold, upon a constructive idea, that there is a want of good faith. In the absence of want of good faith I do not see that this contract can be rescinded.

But then there comes in the doctrine that if there be a misrepresentation of facts, however innocently made, the Court of Equity will not enforce the performance of the contract. Now here you have facts which were known to the trustee before the condition was drawn up, which when shewn to the Court oblige the Court to say that it would be wrong to ask the purchaser to assume that which is the purport of the assumption he is required to make. And there are facts which were known to the trustee which when shewn to the Court oblige the Court to say that it might have been accurately known and satisfactorily explained how *Esther Banister* acquired the property.

Therefore there were facts known to the trustee which make the implied representation which is contained in the stipulation that the purchaser should assume a certain state of things erroneous —it also makes the other statement of fact erroneous. It is most unfortunate that those facts being known to the trustee when he went to a person whose opinion he was bound to ask, and upon whose opinion he was bound to act, by some misfortune—I am sure I am not prepared at all to say it was a misfortune that might not have happened to the most skilful counsel, but it is a misfortune—that this skilled counsel did draw up this condition, that there is a difference of opinion between the Court and that skilled counsel, and therefore the Court is bound to act upon its own view. That view, therefore, is that the condition is so drawn as to make an erroneous representation of facts.

Under those circumstances, can it be right to decree the specific performance of the contract against the purchaser without his having the opportunity of having a title such as my Lord has pointed out? It is said that we ought to do so because it is no fault of the trustee, and that if it is anybody's fault—that is, if there is an error by anybody—it is the fault and error of the conveyancing counsel; but I cannot help saying that if that is a true state of facts you must bring in a principle of law which is well known, which is, that if there are two innocent parties, and there is an error by a third party, it is the one party who in law is supposed to be bound by his act who must suffer. I cannot help thinking that a conveyancing counsel in drawing a condition of sale is acting for the vendor, and when he makes the error which exists in this case you must not decree specific performance against the purchaser.

I therefore think, upon the facts made known to this Court, although there is no want of good faith at all, yet there has been an erroneous representation which is part of the condition—that as this condition of sale is part of the contract there has been an erroneous representation as to a part of the contract—and that under those circumstances specific performance cannot be decreed in the terms of the contract, and that therefore the purchaser here has a right to have the abstract of title shewn to him and proved.

COTTON, L.J.:—

The result of this case may be that the purchase-money will have to be returned, and that the purchaser will get his costs—that is to say, the result may be the same as if the contract had been rescinded; but it is not a question of rescinding the contract on the ground of misrepresentation made by the vendor to induce the purchaser to enter into it, but it is this—whether or no the Court will hold the money of the purchaser and compel him to take a conveyance upon the title which has already been shewn to him; that is to say, it is a question of specific performance, and not of rescinding the contract.

How does the question arise? A title was shewn to the purchaser in accordance with the conditions of sale, but on making inquiries as to matters which were open to him under those conditions as to the title shewn, he ascertained a fact which he contended raised a doubt as to the title being in accordance with what was stated in the conditions of sale, and he required further information; that is to say, he required the vendor to make a further abstract of title, or to have a further investigation of title to clear up the doubt. If the purchaser is not concluded by the conditions of sale, it must be admitted that he is entitled to further information and further investigation of title than that which he has already got. He has not got such a title as the Court can force upon him. But it is said that the purchaser, having concluded himself by those conditions of sale, has got all he is entitled to, and must not ask anything more, and is not at liberty to shew that the title is defective. The question, therefore, is, whether or no, for the purposes of specific performance, the purchaser is bound by the conditions of sale so that the Court will, in consequence of what is contained in those conditions of sale, force upon him a title which is not shewn to be either a good holding title or a good marketable title. Now I take it that conditions of sale must be fair, and for the purposes of the present case I think one may lay down this, that in conditions of sale there must not be made any representation or condition which can mislead the purchaser as to the facts within the knowledge of the vendor, and that the vendor is not at liberty to require the purchaser to assume as the root of his title that which documents within his possession shew not to be the fact, even though those documents may shew a perfectly good title on another ground; and the question here, in my opinion, is whether or no it is shewn that there were within the knowledge of the vendor facts which made the 10th condition of sale a misleading condition. In my opinion it is shewn to be the case. I will take only one of these statements. The condition, after stating how the title is to begin from 1835 with a declaration of title by a person who had been in possession under *Esther Banister*, goes on in this way—" Who shall be assumed to have been seised of and entitled to the entire property in fee simple in possession free from incumbrances at the time of letting the farm in 1835 and up to and at her death." Whether or no the documents were before Mr. Justice *Fry*, it is now shewn that there were facts within the knowledge of the vendor inconsistent with what the purchaser is there asked to assume. When we get that which was in fact laid before the conveyancing counsel, and referred to in the statement of the vendor in this case, we do in fact find that he did know that in 1835 and thence down to 1844 that that which the conditions say is to be assumed as to *Esther Banister's* title was not the fact.

As this is so, in my opinion it would be wrong under any circumstances to hold the purchaser by this condition, and preclude him from making those inquiries which the facts that have come to his knowledge render it desirable he should make, in order to see whether in fact there is a good title; but I think in a case of this sort, where the sale is by the Court, the Court is bound to take more especial care, if possible, that there shall be nothing in the conditions, or in the representations therein contained, which by possibility can mislead a vendor, because the purchaser has a right to assume that the Court will take very good care that there shall be nothing that can in any way mislead him as to the title he is getting. But it is said, and I must deal with that, that there is no fault here on the part of the vendor personally, that if it is anybody's fault it is an error (and counsel, Judges, and every one else may fall into error) of the officer of the Court, and therefore the purchaser should not be relieved. In my opinion that is an entire mistake as to the functions in such a case of the conveyancing counsel as between vendor and purchaser. No doubt the trustee vendor is bound to go to the conveyancing counsel, but he is the person who is appointed to see that the conditions are such as the trustee can properly sell under, having regard to the interests of the persons who take an interest

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in the property, whether before the Court or not, for whom the trustee is selling, and for whom the Court directs him to sell. But as between the purchaser and the vendor and all parties interested in the sale, any error committed by the person so consulted and so advising must be considered as the error of the vendor, and the purchaser is entitled so to treat it.

Then there is another point to which I would advert. Mr. *Glasse* has said what can the purchaser gain by this? He has not shewn that he has not got a good title, and the Master of the Rolls has said that on the facts stated it will be shewn he has got a good title. But he is entitled to be satisfied as to how his title is to be made out, and although the facts stated in the case, if true and made out, may make a good title (upon that point I give no opinion, as it is not properly before us now), he has a right to see whether those facts can be made out, and he has a right, in my opinion, notwithstanding that condition, to have those difficulties which he has shewn to exist cleared away before his purchase-money is taken away and divided and before he is compelled to take specific performance of the contract.

Solicitors for Purchaser: *G. A. Crawley & Arnold.*
Solicitors for Vendor: *Munton & Morris.*

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Will—Legacy—Forfeiture—Bankruptcy or Alienation—Practice—Insolvent Testator—Two Actions relating to Estate—Creditors' Administration Action—Executrix-Legatee—Conflicting Interests—Order for Plaintiff to "intervene" in Second Action—Irregularity—Creditor appearing in Name of Executrix.

Where a testator makes a bequest coupled with a clause of forfeiture on bankruptcy or alienation, the Court considers it to be his manifest intention that the bequest shall enure to the personal enjoyment and benefit of the legatee; and will therefore construe the clause, if ambiguous in its terms, in such a way as to effect that intention.

Semble, where there is a bequest to *A.* for life, with remainder to *B.* absolutely, followed by a clause of forfeiture of *B.'s* interest in the event of his bankruptcy or alienation, and *B.* charges or mortgages his interest in the lifetime of the tenant for life, to prevent a forfeiture the charge must have been vacated or the incumbrance destroyed before the period of distribution, that is, the death of the tenant for life, and not merely before the time for *B.'s* first receipt of money under the bequest.

White v. *Chitty* (1) questioned.

A testator bequeathed his residuary estate to his wife for life, and after her death to his son absolutely, "if at the decease of my said wife he shall not be or have been declared bankrupt, or have taken the benefit of any Act or Acts for the relief of insolvent debtors, or have committed or done any other act, matter or thing which would make such ultimate surplus payable or transferable to or vested in or chargeable for the benefit of any other person or persons in case such surplus had been given to him absolutely and without any condition or contingency: but if he shall at any time before the decease of my said wife have been declared bankrupt or taken the benefit of any Act or Acts of Parliament for the relief of insolvent debtors, or shall have committed or done any such other act, matter or thing, then" upon trust for the son's wife for her life and after her death for her children.

The testator died leaving his widow, the tenant for life, surviving. By three deeds executed in the widow's lifetime the son mortgaged his interest under the will, "subject to the said proviso or condition in the said will." All three mortgages were satisfied by the son in the widow's lifetime. On the discharge of the first two mortgages reassignments were executed, but on the discharge of the third mortgage the son took no reassignment, the mortgage deed being simply handed back to him with the seals and attestation clause cut off. The son then died insolvent, whereupon an action was brought by his only child against his widow and executrix to have it declared that the execution of the mortgages operated as a forfeiture of the son's interest:—

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(1) Law Rep. 1 Eq. 372.

Held, that no forfeiture had taken place.

Upon the son's death an action of *Bennett* v. *Samuel* was instituted by a creditor in another branch of the Court for the administration of his estate. In that action an order was made giving the Plaintiff leave to apply in the present action (*Samuel* v. *Samuel*) to "intervene therein by appearing at the trial and contending that there was no forfeiture of the son's interest." Upon production of this order the Chief Clerk to the Master of the Rolls made an order giving the Plaintiff in *Bennett* v. *Samuel* leave to "intervene" in *Samuel* v. *Samuel* accordingly, whereupon that Plaintiff appeared at the trial of *Samuel* v. *Samuel* to contend against the forfeiture:—

Held, that, although, under the circumstances, that Plaintiff was entitled to his costs of appearance, both orders were irregular, and that the proper course was for him to have obtained an order in *Bennett* v. *Samuel* for leave to appear in *Samuel* v. *Samuel* in the name of the son's widow, her interest as his executrix being in conflict with her beneficial interest under his father's will.

SIMON SAMUEL, by his will, dated in 1854, devised and bequeathed his residuary real and personal estate to his wife, *Esther Samuel*, and three other persons, upon trust for sale and investment, and to pay the income thereof to his said wife for her life: and he directed that after her death his trustees should, out of his residuary estate, raise certain legacies, and stand possessed thereof upon trusts therein mentioned. The testator then proceeded as follows: "As to and concerning the ultimate surplus (if any) of my said residuary estate or of the moneys to arise from the sale, disposition and conversion thereof, and as to and concerning any part or parts of my residuary estate, or the stocks, shares, funds, or securities, in or upon which the same may be invested, the trusts hereinbefore declared of which may happen to fail or determine, I do hereby give and bequeath the same unto my son *Horatio Simon Samuel* for his own use and benefit, if at the decease of my said wife he shall not be or have been declared bankrupt, or have taken the benefit of any Act or Acts for the relief of insolvent debtors, or have committed or done any other act, matter or thing which would make such ultimate surplus payable or transferable to or vested in or chargeable for the benefit of any other person or persons in case such surplus had been given to him absolutely and without any condition or contingency: but if he shall at any time before the decease of my said wife have been

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declared bankrupt or taken the benefit of any Act or Acts of Parliament for the relief of insolvent debtors, or shall have committed or done any such other act, matter or thing, then I direct that such ultimate surplus, and the interest, dividends and annual income thereof to accrue from and after the decease of my said wife shall be held" upon trusts therein mentioned for the wife of the said *H. S. Samuel* during her life, and after death for his children.

The testator died in 1859 leaving his widow, *Esther Samuel*, him surviving.

By three deeds executed in 1860 and 1861, in the lifetime of the testator's widow, *Horatio Simon Samuel* mortgaged to one *Russell* all the testator's residuary real and personal estate to which he, the said *H. S. Samuel*, was entitled under the said will upon the decease of the said *Esther Samuel*, "subject nevertheless to the said proviso or condition in the said will contained."

All three mortgages were paid off or satisfied by *H. S. Samuel* in the lifetime of *Esther Samuel*. On the discharge of the first two mortgages reassignments were executed to him, but on the discharge of the third mortgage he took no reassignment, the mortgage deed being simply handed back to him with the seals and attestation clause cut of.

H. S. Samuel died in 1870, insolvent, having by his will given all his property to his wife, *Henrietta Samuel*, and appointed her his sole executrix. She duly proved the will in 1872.

Esther Samuel died in 1877.

In August, 1875, this action was instituted by *H. S. Samuel's* only child against the trustees of *Simon Samuel's* will and *H. S. Samuel's* widow and executrix to have it declared that the execution of the mortgages by *H. S. Samuel* operated as a forfeiture of his interest under his father's will.

It appeared that in 1872 an action of *Bennett* v. *Samuel* had been instituted in Vice-Chancellor *Malins*' Court on behalf of *H. S. Samuel's* creditors against his widow and executrix for the administration of his estate, and that a decree had been made accordingly. Subsequently, on the 31st of January, 1878, the Plaintiff in that action applied for and obtained an order in Chambers "that he be at liberty, as the Plaintiff in that action, and in his character of a Plaintiff suing on behalf of himself and all other the creditors of *H. S. Samuel*, to apply for leave to intervene in the suit of *Samuel* v. *Samuel*, and, if such leave be granted, to intervene in the said suit of *Samuel* v. *Samuel* by appearing at the trial thereof, and contending that there was no forfeiture of the interest of the said *H. S. Samuel*." Upon the production of that order the Chief Clerk to the Master of the Rolls, on the 25th of February, 1878, made an order that the Plaintiff in *Bennett* v. *Samuel* might "be at liberty to intervene in this cause" (*Samuel* v. *Samuel*) "by appearing on the hearing thereof and contending that there was no forfeiture of the interest of the said testator *H. S. Samuel*."

The present action (*Samuel* v. *Samuel*) now came on for trial, the Plaintiff in *Bennett* v. *Samuel* appearing at the trial under his order.

Seward Brice, for the Plaintiff in *Samuel* v. *Samuel*:—

I submit that the execution by *H. S. Samuel* of the mortgages caused a forfeiture of his interest under his father's will, and consequently the gift over takes effect: *Kearsley* v. *Woodcock* (1); *In re Payne* (2); *Trappes* v. *Meredith* (3). In fact, under the circumstances, the property never really became his at all, he having made an attempt at alienation during the lifetime of the tenant for life.

The fact that the mortgages were satisfied in the lifetime of the tenant for life, before any property could be handed over, makes no difference. It is not as in the case of a bankruptcy, where a forfeiture clause does not apply if the bankruptcy is annulled before the time has arrived at which the property is to be paid or handed over: *Trappes* v. *Meredith*; *White* v. *Chitty* (4). Here the gift never took effect at all, the legatee not having fulfilled the condition of the gift. The object and meaning of the testator was that his son's creditors were not to benefit in any way by the bequest, and that if he attempted to charge the legacy his interest was to cease, and the property was to go over to his wife and children. The order under which the creditors appear seems irregular. The Plaintiff in their action should have

(1) 3 Hare, 185.
(2) 25 Beav. 556.
(3) Law Rep. 9 Eq. 229, 232.
(4) Ibid. 1 Eq. 372.

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been joined as a Defendant in this action, under Rules of Court, 1875, Order xvi.

Chitty, Q.C., and *Romer*, for *H. S. Samuel's* widow and executrix, referred to *In re Parnham's Trusts* (1).

Roxburgh, Q.C., and *Grosvenor Woods*, for the Plaintiff in *Bennett* v. *Samuel*, were not called upon, but in reply to his Lordship said they would leave the question of costs in his Lordship's hands.

Ince, Q.C., and *A. Young*, for the trustees of *Simon Samuel's* will.

Jessel, M.R. :—

In this case the question I have to decide I must decide exactly in the same way as if *Horatio Simon Samuel* were now alive and claimed the fund.

The testator gave his residue to his wife for life, and after her death, and subject to certain legacies, he gave the ultimate surplus as follows: "I do hereby give and bequeath the same unto my said son *Horatio Simon Samuel* for his own use and benefit, if at the decease of my said wife he shall not be or have been declared bankrupt, or have taken the benefit of any Act or Acts for the relief of insolvent debtors, or have committed or done any other act, matter or thing which would make such ultimate surplus payable or transferable to or vested in or chargeable for the benefit of any other person or persons in case such surplus had been given to him absolutely and without any condition or contingency."

Now there can be no doubt whatever that a charge created in the lifetime of the tenant for life, paid off in the lifetime of the tenant for life, does not come within those words; and, consequently, the son would have taken absolutely if his interest had not been cut down by the subsequent words.

In considering the subsequent words, one must recollect that there is a contingency described in the prior words under which he is to take; and it is impossible, in accordance with the ordinary rules of construction, to hold that two people, not taking together, take in the same contingency. Therefore one must consider the second contingency to be correlative of the first: and it must mean this, If my son does not take it under the prior gift, then it is to go over. That is how I must read the words. It is true the words are, in terms, if he shall at any time before the decease of the tenant for life have been declared bankrupt or done any other act, matter or thing; but, when you come to look at the words "any other act, matter or thing," what is it? It is an act, matter or thing whereby, at the decease of the wife, the ultimate surplus would have become payable to another person. Therefore, as regards any "act, matter or thing," which is all I have to consider, it is literally within the prior words, and is, as I read it, an alternative gift. I am satisfied that is the only possible meaning. If that is so, there is really nothing at all to argue. He did not do anything by which at the death of the wife the moneys were charged or payable to anybody else.

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(1) Law Rep. 13 Eq. 413; 46 L. J. (Ch.) 80.

There is, however, a great deal more to be said in the case than that, although I have no occasion to go into it. In the first place, I am by no means satisfied that the son ever charged the property at all. As I read the instruments, they do not amount to a charge, if he had no power to charge. They are clumsily drawn, but when you look at the habendum in each case, "subject nevertheless to the said proviso or condition in the said will contained," in my opinion it means in substance this, "I charge, if I can charge; and I do not, if I cannot charge." Otherwise those words would have no possible meaning, whereas in that view they would have a meaning. The mortgagor would not wish to charge merely to create a forfeiture, and the mortgagee would not wish to charge merely to create a forfeiture. The fact is, the mortgagor was debtor to the mortgagee, and why should he wish to create a forfeiture and so destroy his means of paying the mortgagee? The interest of the mortgagee is exactly the same. Therefore, when I find these words, and a rational meaning can be given to them, namely, "I charge if I have power to charge, and I do not charge if I have no power to charge," why should I not give the rational meaning? It seems to me that that is the rational meaning, and, consequently, the property never was charged at all.

I am now disposing of the case before me on two points of construction, but there is a general principle which appears to me to govern all these cases—a principle which has been laid down by a Lord Chancellor, and which, I think, binds me to come to the same conclusion, even if the words were more difficult to deal with than they are.

In *Trappes* v. *Meredith* (1) Lord *Hatherley*, then Lord Chancellor, after stating the facts, says this: "Now, that being so, the question arises whether this case falls within the principle of *Manning* v. *Chambers* (2), decided by the Lord Justice *Knight Bruce*, and *Seymour* v. *Lucas* (3), decided by Vice-Chancellor *Kindersley*—cases which, I think, are completely founded in reason and good sense." Those cases, it must be remembered, were cases in which words of futurity relating to bankruptcy were held to include a pending bankruptcy, so that the forfeiture took place; because, although the testator said, "in case the legatee shall become bankrupt," that was held to include the words "and, in case he should be bankrupt," the manifest intent being that he should have personal enjoyment.

Then Lord *Hatherley* goes on to say, "In accordance with those cases, I, in *White* v. *Chitty* (4), came to the conclusion that words of futurity in a gift of this description are not to operate so as to defeat the manifest intention of the testator, that the gift shall be a personal benefit to the legatee, and shall not become payable to any other person." *White* v. *Chitty* was the converse case. There the bankruptcy had been annulled; and Lord *Hatherley*, when Vice-Chancellor, held that the annulment of the bankruptcy being before the first receipt of money under the gift, and there being nothing therefore to deprive the legatee of personal enjoyment, no forfeiture had occurred. I see that in *In re Parnham's Trusts* (5) I also held that there having been an annulment, there was no forfeiture. In that case the annulment took place in the lifetime of the tenant for life, and I said I doubted the decision of *White* v. *Chitty*; but for this reason, not that I doubted the principle, but that I doubted whether the principle ought to apply to an annulment after the death of the tenant for life, and whether the fact of the actual receipt of income should have made any difference. I had not the slightest doubt as to the right application of the principle, and I followed it in *In re Parnham's Trusts* (1). But that is a very minute point indeed, namely, whether, to prevent a forfeiture, the vacation of the charge or the destruction of the incumbrance ought to take place before the period of distribution, or whether it is sufficient if it takes place only before the first date of actual payment. I still think, upon that minute point, the right period is the period of distribution; in the present case it is so certainly, because the testator points expressly to the death of the tenant for life. Lord *Hatherley* came to that conclusion in *Trappes* v. *Meredith* (2), for he says, "Upon that principle there would have been no reason for doubting that by the second clause of the will a complete forfeiture had taken effect; because the clause directs that if the whole or any part of this annuity became vested in another person and not in the donee, then from that moment the annuity should cease to be payable."

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(1) Law Rep. 7 Ch. 248, 251.

(2) 1 De G. & Sm. 282.

(3) 1 Dr. & Sm. 177.

(4) Law Rep. 1 Eq. 372.

(5) 46 L. J. (Ch.) 80.

I do not quite take the view that the Vice-Chancellor *Wood* took in *White* v. *Chitty* (3), that the Courts have strained the words. I think the Courts have only endeavoured to ascertain from the words the fair meaning of the testator. That is all they have done in deciding that words of futurity as regards bankruptcy or insolvency apply to a pending bankruptcy; and, on the same principle, whatever the words are which are used where the object of the testator is attained, it is exactly what Lord *Hatherley* says. The testator's object being that the legacy shall be a personal benefit to the legatee, and not payable to any other person, why should you not give effect to that object, even supposing the expressions may be capable of some other interpretation? I think the principle laid down by Lord *Hatherley* is a sound one, and that it is a guiding rule in deciding these cases, not to construe ambiguous expressions otherwise than for the purpose of securing that which it is obvious, from the expressions themselves, it was the intention of the testator to secure, namely, that the bequest should enure to the personal enjoyment and benefit of the legatee, which, of course, would have happened in this case if *Horatio*

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(1) 46 L. J. (Ch.) 80.

(2) Law Rep. 7 Ch. 248, 251.

(3) Law Rep. 1 Eq. 372.

Simon Samuel had been alive at the death of his mother, and had done no other acts than he has done.

On that ground, also, I am of opinion that the Plaintiff's case fails.

The creditors appear separately, under an irregular order. I wish to mention this, in order that it may not be drawn into a precedent. What has happened is this: The executrix of *Horatio Simon Samuel*, whose duty it would have been in an ordinary case to contest the claim of the Plaintiff, happens to be the mother of the Plaintiff, and happens also to have an interest as tenant for life under the will of *Simon Samuel*—an interest which naturally weighed more with her than her duty to the creditors of her deceased husband, *Horatio Simon Samuel*. An action was instituted by the creditors, and for the Plaintiff in that action Mr. *Roxburgh* appears. In the creditors' action, which is attached to the Court of Vice-Chancellor *Malins*, the Plaintiff obtained what, in my opinion, is a wholly irregular order. I suppose it was made by the Chief Clerk there without sufficient consideration. I never saw an order of that sort before, and I hope I never shall see one like it again. The order was on the application of the Plaintiff in the creditors' action. It was ordered that the Plaintiff should be at liberty to apply for leave to intervene in the action of *Samuel* v. *Samuel*—that is, the present action before me—and, if such leave were granted, to intervene by appearing at the trial and contending there was no forfeiture of *Horatio Simon Samuel's* interest. That is not the right form of order. Where, in an administration suit, there is reason to believe, as there was in this case, that the legal personal representative will not perform his duty and defend the estate, the right course to take is for somebody to appear in his name. A person who accepts a duty is not entitled to say that he will not fulfil that duty because he has an adverse interest. The answer is, "You should not have accepted the office which cast that duty upon you;" and, therefore, the Plaintiff in the administration action would have been entitled to appear in the name of the executrix under an order obtained in the administration action, and we should not have had two parties.

What was done next was this: Acting under that order of Vice-Chancellor *Malins*, the Plaintiff in the creditors' action came before my Chief Clerk—of course it was nominally my order, and nothing I am going to say is to be taken as meaning that it is not binding on me as much as if it were made by me personally—he came before my Chief Clerk and shewed him the Vice-Chancellor's order—not that I presume it was actually his order, for I do not know whether it was or not—whereupon my Chief Clerk, acting on that order as being the Judge's order, actually gave leave in the same terms; and in this suit of *Samuel* v. *Samuel* it is ordered "That the applicant be at liberty to intervene in this cause by appearing on the hearing thereof and contending that there was no forfeiture of the interest of the said testator *Horatio Simon Samuel*."

As I said before, that is not the proper course to pursue. You have no right to add another party to a cause to the prejudice of the Plaintiff, not making him formally a party to the cause. If it were right to give the Plaintiff in the creditors' action leave to intervene, it would have been right to add him as a Defendant. That is the only way you can intervene in a case of this kind. It is not like a hearing on further consideration, where you sometimes give leave to a person to appear and contest a point. This is the first hearing in the action, and nobody has a right to come except as Plaintiff or Defendant; and, therefore, it appears to me this order was entirely irregular. But as the Plaintiff in the creditors' action has appeared, and as the order has not been discharged, and is binding, I think he is entitled to his costs, and must have the costs out of the fund. As he has, also, on the part of the creditors, left to me the question as to the costs of this action, and as it is obvious there was a question to be argued, and that in some shape or other the point would have to be decided, I will make the usual order as to costs, and give everybody his or her costs out of the fund.

The order will be as follows: The Court being of opinion that the executrix of *Horatio Simon Samuel* is, as such executrix, entitled to the whole of the residue of *Simon Samuel's* personal estate, dismiss the action, but, the Plaintiff in the creditors' action not objecting, direct that the costs of all parties be paid by such executrix out of the estate.

Solicitors: *Kearsey, Son, & Hawes; G. S. & H. Brandon.*

V.-C. B.
1879
April 25.

BRAY *v.* STEVENS.

[1865 B. 133.]

Will — Construction — Gift of Legacies — Devise of Specific Realty, and of Residuary Realty and Personalty in one Gift—Failure of Residue—Legacies held charged on the Specific Realty.

Testator directed that all his debts and funeral and testamentary expenses (not mentioning legacies) should be paid out of his personal estate. He then gave a number of legacies, and directed that if one of the legacies should fail, it should fall into his "residuary estate." He then devised all his freehold and leasehold hereditaments in the parishes of *B.*, *L.*, and *R.*, "and all the rest, residue, and remainder of" his real and personal estate, to trustees, upon trust to make a weekly payment to his wife during her life, and subject thereto to invest the residue, and after his wife's decease, as to all his freeholds, and all his leaseholds, and all the residue and remainder of his estate and effects, to stand possessed thereof upon certain trusts.

The personal estate, and the real estate other than the real estate in the parishes of *B.*, *L.*, and *R.*, were insufficient to pay the legacies:—

Held, that the case was within the rule of *Greville* v. *Browne* (1), and that the legacies were a charge on the real estate in the parishes of *B.*, *L.*, and *R.*

Castle v. *Gillett* (2) not followed.

ADJOURNED FURTHER CONSIDERATION.

John Stevens, late of the *Red Lion Inn*, *Redruth*, *Cornwall*, died on the 24th of November, 1863, having by will dated the 22nd of October, 1863, devised and bequeathed (so far as is material) as follows:—

"I desire that all my just debts, funeral expenses, and the costs and charges of proving this my will be paid out of my personal property by my executors as soon as may be convenient after my decease." Testator then gave to his brother-in-law, *John Trethowan* a legacy of £100 on the condition that he released the testator from a certain promise, and abandoned all claims to any portion of the rent of certain fields at *Bodmin*, and declared that if he refused to abandon such claim, not only that legacy but also the legacy to his wife next thereinafter contained, "shall not be paid, but both of such legacies shall fall into and form a portion of my residuary estate." Subject to the abandonment by *John Trethowan* of such claims as aforesaid, testator gave to the legatee's wife, *Mary Trethowan*, a legacy of £100, and then gave legacies of £50, £50, £100, £10, and £10, to certain legatees named. He then gave to his brother *William Stevens*, one of the trustees and executors of his will, a legacy of £100, on condition of his accepting such trusteeship and executorship. He then gave a legacy of £19 19*s.*, and added: "I wish all the above legacies to be paid, if possible, within twelve calendar months of my decease." He then gave to his brother *William Stevens*, and to his brother-in-law *John Trethowan*, and the survivor of them, his executors and administrators, the sum of £300, upon trust "to apply the interest and produce thereof for four years from my decease in aid of the residue of my said estate; and I declare that such interest for the said four years shall be treated as part of such residue; and on the expiration of the said four years to pay the said sum of £300, less legacy duty, to" the person or persons therein named. He then proceeded as follows:—

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(1) 7 H. L. C. 689.

(2) Law Rep. 16 Eq. 530.

"All my fee-simple freehold and leasehold lands, houses, and hereditaments, sitaute in the parishes of *Bodmin*, *Lanivet*, and *Redruth*, and elsewhere in the county of *Cornwall*, and all the rest, residue, and remainder of my real and personal estate, money, mine shares, chattels, and effects, of whatsoever kind, and wheresoever situate, I give, devise, and bequeath, according to the respective natures and qualities thereof, to my brother *William Stevens*, and my said brother-in-law *John Trethowan*, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, upon the trusts nevertheless, and to and for the ends, intents, and purposes hereinafter declared of and concerning the same, that is to say":—

The trusts were to pay every week to his wife for life, or until she married again, the sum of £1 18*s.* 6*d.*, and after her second marriage the sum of 13*s.* 4*d.*

Testator then continued: "And I declare that my said trustees or trustee shall, at the end of every twelve months from my decease, make out an account of the moneys which shall come to their or his hands in virtue hereof during the life of my said wife, and, after payment of the said weekly stipend to my said wife and other legal and necessary payments, do and shall invest the clear residue of the said moneys at interest on government or real securities in *England* or *Wales*, ... and from and after the decease of my said wife, as to all the said fee-simple and freehold lands, messuages, and hereditaments, and also my leasehold messuages and tenements, and also all the rest, residue, and remainder of my said estate and effects of whatever nature, so vested in my said trustees as aforesaid, and the stocks, funds, and securities wherein the same shall be invested, and the annual income henceforth to become due thereon, the same shall be held upon the trusts following, that is to say":—

Testator then bequeathed one-third to one legatee, one-third to a second, and the remaining third to a third legatee, and appointed *John Stevens* and another his executors.

The bill was filed on the 25th of April, 1865, by *John Bray*, one of the legatees, against *John Stevens*, the surviving trustee of the will, for administration.

The widow died on the 18th of November, 1877.

It turned out that the testator had no real estate whatever out of the county of *Cornwall*, and none of any substantial value, except certain freeholds in *Bodmin*, *Lanivet*, and *Redruth*, which were worth about £1700.

The pecuniary legacies, with interest, amounted together to £890 5*s.* 8*d.*; and the personalty being insufficient to pay them, the sole question (which had been reserved by the Chief Clerk's certificate of the 29th of March, 1879) now was, whether the legacies were charged on the real estate in the parishes of *Bodmin*, *Lanivet*, and *Redruth*, or whether such real estate went to the residuary devisees clear of the legacies.

Cozens-Hardy, for the Plaintiff:—

The legacies are charged on the real estate. If there are general gifts of legacies and then of the rest and residue, real and personal, blending the whole in one mass (though accompanied by a power to the legatee of the residue "to dispose of the same in any manner he may think proper"), the legacies are a charge on the realty: *Greville* v. *Browne* (1), per Lords *Campbell*, C.,

(1) 7 H. L. C. 689, 696.

Brougham, Cranworth, and *Kingsdown;* Lord *Wensleydale* only dissenting.

This rule having been acted on by the Court of Chancery for 200 years, was held by the Master of the Rolls in *In re Brooke* (1) not to be affected by the circumstance of a prior direction that "debts and legacies" are to be paid by the executors.

The doctrine is explained also by the Master of the Rolls in *Gainsford* v. *Dunn* (2), citing a decision of Vice-Chancellor *Wood* in *Gyett* v. *Williams* (3).

Rawlins, for one of the residuary legatees:—

The construction of this will is the same as that which was adopted by Vice-Chancellor *Malins* in *Castle* v. *Gillett* (4), where the learned Judge said: "Here the testator gives" real estate "specifically, and then he adds, 'and all the residue of my estate and effects, real and personal.' And when one thing is specifically mentioned, and the residue is afterwards referred to, it is evident that the testator does not intend to treat what is specifically mentioned as part of such residue. Therefore I hold that the legacies are not charged on" the real estate.

In other words, there is not here, nor was there in *Castle* v. *Gillett,* such a blending of realty and personalty as to render applicable the doctrine of *Greville* v. *Browne* (5).

[BACON, V.C.:—Of what use then is that important word "and"? Surely the effect of that word is to tie the two things together and make one of them.]

No doubt they are tied together in the sense that the same legatees are made recipients of both.

The doctrine of *Kightley* v. *Kightley* (6), that in order to charge legacies on land there must be a clearer intention than is necessary to charge debts, was approved in *Bench* v. *Biles* (7), by Sir *John Leach,* V.C., though the decision in that case went the other way. The learned Judge says: "It is truly stated that legacies form no charge on the real estate to affect the heir or devisee, unless the testator has shewn a manifest intention to that effect."

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(1) 3 Ch. D. 630.

(2) Law Rep. 17 Eq. 405, 408.

(3) 2 J. & H. 429, 438.

(4) Law Rep. 16 Eq. 530, 532.

(5) 7 H. L. C. 689.

(6) 2 Ves. 328.

(7) 4 Madd. 188.

In *In re Brooke* (1) there was the potent word "including."

Ingle Joyce, for the other residuary legatees:—

The question is not whether the pecuniary legacies are charged on the residue of the real estate, for there is no residuary real estate; the only practical question is, are they charged on the freeholds in *Bodmin*, *Lanivet*, and *Redruth?* Now the devise of the freeholds in *Bodmin*, *Lanivet*, and *Redruth*, is a clear and simple specific devise. We are not concerned to say that the legacies are not a charge on the residue; that may be the result of *Greville* v. *Browne* (2). They may be a charge on the residue, although there is this intervening specific devise: *Hawkins* on Wills (3); all we say is, they are not a charge on the intervening specific devise.

BACON, V.C.:—

Referring to what has been said about Lord *Brougham's* judgment in *Greville* v. *Browne*, and to what has been read from Vice-Chancellor *Wood's* decision in *Gyett* v. *Williams* (4), I observe that Lord *Brougham* and Vice-Chancellor *Wood* were of the same way of thinking as to one point, and that point was this: Lord *Campbell's* judgment in *Greville* v. *Browne* (5) began by saying, "If this were *res integra*, one might think so and so." Lord *Brougham*, in his judgment, says (6), "I do not agree with Lord *Campbell* in that; in all other respects I do agree;" and Vice-Chancellor *Wood* agreed with Lord *Brougham*.

I must say if this were *res integra*, I should entertain no doubt whatever that the legacies are charged upon the entirety of the testator's estate, because I cannot impute to the testator such an absurdity—such a mockery as to these legatees—as to give them legacies when he knew his personal estate had no means of satisfying them. He seems, perhaps, to have had that notion in his mind, because when he directs the payment out of his personal property, he does not use the word "legacies,"—"I desire that all my just debts, funeral expenses, and the costs of proving this my will, be paid out of my personal property." There is nothing about payment of the legacies out of the personal property, although, beyond doubt, the personal estate would be the first fund to which recourse must be had in order to satisfy the legacies.

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(1) 3 Ch. D. 630.

(2) 7 H. L. C. 689.

(3) Page 295.

(4) 2 J. & H. 429, 438.

(5) 7 H. L. C. 696.

(6) Ibid. 699.

These questions of construction, no doubt—as everybody knows, it is commonplace observation—present difficulties, because you may cavil at the words the testator has used. You may twist them in a variety of ways, and say they mean this, that, and the other. There is very great danger in adopting any of these constructions which the ingenuity of counsel may suggest, but there is the still greater danger of perverting or not following the plainly expressed intention of the testator. Now that last difficulty is in some degree removed by the well-established rule adverted to in *Greville* v. *Browne* (1). In *Greville* v. *Browne* there was a strong temptation to say that the gift was specific, as Mr. *Ingle Joyce* has said here, because the testator, as well as I recollect, in the course of his will spoke of his son as the "first object on earth" to him, on which I dare say a great deal of argument was founded, as it might be. With all that I have nothing to do. But *Greville* v. *Browne* decided that there had been, for hundreds of years before that case came before the Court, a plain rule, that when a testator gives pecuniary or other legacies, and gives the residue of his estate bound up, blended, tied together—the whole of his property is subject to the legacies—the legacies must be held to be charged upon that entirety. Now I find what this will does, not only in meaning—not only in fair reasonable conjecture of what the testator must have meant—but in the very words he has used, so charge the entirety; for see what it is he does. Not having, as I have observed, directed the payment of the legacies out of his personal estate, he goes on to give legacies, and he says: "I wish all the above legacies to be paid, if possible, within twelve calendar months of my decease." Then he comes to the residue. I should observe, he says before that, with respect to a certain legacy, that if it should fail it should fall into his residue. That is a pretty strong intimation of what he meant; for if the residue was to be augmented by the failure of the legacies, then the

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(1) 7 H. L. C. 689.

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v.
STEVENS.

residue was the thing out of which the legacies were to be paid. That, however, is not conclusive. But when it comes to the gift of the residue, it is beyond possibility of doubt, when he says, "All my fee simple, freehold and leasehold houses and hereditaments situate in the parishes of *Bodmin, Lanivet,* and *Redruth,* and elsewhere in the county of *Cornwall,* and all the rest, residue, and remainder of my real and personal estate . . . I give . . . according to the respective natures and qualities thereof to" the trustees—for what purpose? To receive the whole income of those several properties by one title—by his direction and with his authority to receive them all; and out of them the trustees are to pay to the widow £1 18*s.* 6*d.* a week, and that is capable of being reduced in certain events to 13*s.* 4*d.* What is to be done with the rest of that blended income? The trustees are to keep an account of it; at the end of every twelve months they are to make out "an account of the moneys which shall come to their hands in virtue hereof"—that is, in virtue of this blended gift—"during the life of my said wife, and after payment of the said weekly stipend to my said wife, and other legal and necessary payments"—Are not the legacies legal payments? Can anybody say they are not?—"do and shall invest the clear residue," and so on; and then there is a gift over to the persons who may be held devisees of the residue. I think the testator, in as plain terms as could be desired—I do not say as could be devised—has said, "The residue shall be in the hands of my executors, managed and husbanded by them, subject to a payment of £1 18*s.* 6*d.* a week to my wife during her life; they shall keep punctual accounts; all that they have above that they shall invest and hold as part of the residue of my estate; and when her death shall happen, then it shall be divided." If I did not find, as I do, conclusive authority in *Greville* v. *Browne* (1), and if I did not find that the Master of the Rolls and Vice-Chancellor *Wood* have followed that authority, I should hold without the least question that the case was free from doubt.

The only thing suggested to the contrary is the decision of Vice-Chancellor *Malins* in *Castle* v. *Gillett* (2), of which I speak with the greatest possible respect, but which I am unable to follow.

(1) 7 H. L. C. 689.

(2) Law Rep. 16 Eq. 530.

The Vice-Chancellor found there a specific gift, as he thought severed from residue. If that was so—and the facts of the case might well have justified that conclusion—then it was not a case of blending. It was not within *Greville* v. *Browne* (1); it was not subject to the rule. But in the case before me, if words mean anything, these words which the testator has employed mean as if he had said, "I know what the House of Lords decided in *Greville* v. *Browne*, and, following the rule there laid down, I so dispose of my property." In my opinion the assets are blended, and the legacies are charged upon the general estate.

There will be a declaration accordingly.

Solicitors: *Bolton, Robbins, & Busk,* agents for *Downing, Paige, & Kelly, Redruth; Gregory, Rowcliffes, & Rawle,* agents for *J. T. Trevena, Redruth.*

(1) 7 H. L. C. 689.

V.-C. H.
1879
Jan. 31.

MEREDITH *v.* TREFFRY.

Will—Construction—Limitations in Strict Settlement—"Eldest Son."

Except in cases of portions or of a specially qualifying context, "eldest son" means "first-born son."

A testator, by will dated in 1841, devised lands to the use of *A.* for life, with remainder to the use of "the eldest son" of *A.* for life, with remainder, after the decease of the eldest son of *A.*, to the use of the eldest son of his body and his heirs for ever; but in case of the death of the eldest son of *A.* without issue male, to the use of the second, third, fourth, and every other son of *A.* successively in tail male; and the will contained a proviso that the first, second, third, and every other son of *A.* should, before receiving the rents of the lands, take and use the name and arms of the testator. The first-born son of *A.* was living at the date of the will, but died an infant. *C.*, the second-born son of *A.*, was his eldest living son at the time of the death of the testator:—

Held, that the word "eldest" must be construed as "first-born," and that, subject to his father's life estate, *C.* was tenant in tail under the will:

Held, also, that the eldest son of *A.* took by implication an estate tail in remainder after the estate tail of his eldest son.

PETITION.

J. T. Treffry, who died in 1850, by his will, dated in 1841, devised lands to trustees to the use of *E. J. Treffry* for life, with remainder during the life of *E. J. Treffry* to trustees to preserve contingent remainders, and with a proviso that he should take the name of *Treffry* in lieu of his then name of *Wilcocks*, with remainder to the use of "the eldest son" of *E. J. Treffry* for life, with remainder to the trustees during the life of such eldest son to preserve contingent remainders, with remainder, after the decease of the eldest son of *E. J. Treffry*, to the use of the eldest son of his body and his heirs for ever; "but in case of the death of the eldest son of *E. J. Treffry* without issue male" to the use of the second, third, fourth, and every other son of *E. J. Treffry* severally, successively, and in remainder one after another in order and course as they respectively should be in priority of birth, and of the heirs male of the respective bodies of such second, third, fourth, and every other son, every elder of such sons being always to be preferred and to take before every younger of them, and the heirs male of his body. And the will contained a proviso that the first, second, third, and every other son of *E. J. Treffry* who might become entitled to the estates of the testator should, before receiving the rents and profits thereof, take and use the name and arms of *Treffry*, and also contained divers limitations over.

E. J. Treffry survived the testator and assumed his name and arms. He was still living, and had had issue male *Edward*, his first-born son, who was living at the date of the will, but had died an infant at the age of six years, before the death of the testator. *Charles Ebenezer*, his second-born son, who was at the death of the testator his eldest living son, and still survived, and four other sons. *Charles Ebenezer* had had issue both male and female.

The principal question argued was, whether, under these limitations, *Charles Ebenezer Treffry* was tenant in tail or tenant for life only.

Hastings, Q.C., and *Prior*, for *E. J. Treffry* and *Charles Ebenezer Treffry*:—

The ordinary meaning of the word "eldest" is *primogenitus*, or first-born: *Bathurst* v. *Errington* (1), and there is nothing in the context of this will to shew that any other meaning ought to be attributed to it; on the contrary, the use of the word "first" in the proviso that the "first, second, third, and other sons" should assume the name and arms, shews that the words "first and eldest" are used synonymously. *Charles Ebenezer Treffry* is accordingly tenant in tail in remainder expectant upon his father's decease.

Eddis, Q.C., and *A. R. Kirby*, for the infant son of *Charles Ebenezer Treffry*:—

The words "eldest son of *E. J. Treffry*" must be construed as meaning the eldest son for the time being, *i.e.*, not the eldest in point of birth, but the son who, at the time of the testator's death, shall answer the description of "eldest." This will being subsequent to the *Wills Act*, speaks from the death of the testator, and the expression "eldest" is not used with relation to the father of the particular son, but with relation to the brothers of that son, and when once the *primogenitus*, or eldest in birth, is excluded, the person meant is the one than whom there is no older son, that is, the eldest as compared with the other sons. The case of *Bathurst* v. *Errington* (1) has no application; that was a case of a shifting clause, and the words were "shall become the eldest son." Even in that case the reasoning of Lord *Cairns* is in favour of our argument. *Charles Ebenezer Treffry* accordingly takes only a life estate; and this being a devise in strict settlement the other construction would defeat the intention of the testator, for if the word "eldest" is to be taken to mean *primogenitus* an infant son dead before the date of the will might be included.

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(1) 4 Ch. D. 251; 2 App. Cas. 698.

Dickinson, Q.C., and *Romer*, for the trustees.

Cozens-Hardy, Hornell, J. F. Waggett, E. B. Cope, and *Collier*, for other parties.

HALL, V.C.:—

I think this is a very clear case. Stopping before we come to the limitations to the second, third, fourth, and every other son of *E. J. Treffry*, and (passing by for the moment the question as to the meaning of the word "eldest") it appears to me that there is a life estate to the person described as the "eldest son" of *Edward John Treffry*. Then, inasmuch as the words "but in case of the death of the eldest son of *E. J. Treffry* without issue male to the use of the second," and so on, indicate that all the issue male of the eldest son of *E. J. Treffry* are to be exhausted before the next limitation to the second son takes effect, an estate tail in remainder must be given to "the eldest son of *E. J. Treffry*," in order to fill up the gap. In this way you obtain a complete series of limitations, which will exhaust the whole line of male issue of the person described under the words of the "eldest son of *E. J. Treffry*." That being so, and this being a will governed by the *Wills Act*, that estate tail which I have so indicated as being created by implication, is one which would not lapse, particularly in a case like this, where the person who would take under it was actually living at the date of the will. In this manner we get a complete series of limitations. On the other hand, if Mr. *Eddis's* contention is adopted, and the words "eldest son of *E. J. Treffry*" are construed as meaning the eldest son living at the testator's death; that is, if you are to take it in the sense of "eldest son for the time being," or the "eldest son" who at the particular time of the death shall answer the description of eldest son, and not in the sense of eldest in birth, the effect would be to cut out the whole line of issue of the first-born son who has predeceased the testator. There is no authority for that. The words "eldest son" have, in limitations of this description, as I consider, a clear and settled meaning. They mean, as Lord *Cairns* has said in *Bathurst* v. *Errington* (1), "the first-born." The conclusion that in this case they have that meaning is fortified by the consideration that in a subsequent part of the will, where the persons who are to take under the limitations are required to assume the name and arms of *Treffry*, those persons are described as the "first, second, third, fourth, and every other son of *E. J. Treffry*;" that is, the first-born, second-born, and so forth.

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(1) 4 Ch. D. 251; 2 App. Cas. 698.

Even in the case of a shifting clause, where an estate is shifted from one to another, the words "eldest" and "younger" are always read and construed in their primary signification. For that proposition I refer to the well-known case of *Wilbraham* v. *Scarisbrick* (2), which was very elaborately argued and fully considered. In that case there was a shifting clause, as between eldest and second and third sons; there were three sets of estates limited, with a shifting clause between the different sons. It was contended that upon the context of the will the estate would not shift to the person who answered literally the description of "eldest," or "elder," or "younger," but that those words must be read as meaning "eldest or younger in the order of limitation," and the order of limitation must be taken as interpreting the words, and the estate must shift accordingly. But that argument was entirely rejected. In the argument of that case reliance was placed upon the qualified, varied, or other than ordinary signification of the words "elder" and "younger" in the cases of gifts of portions to younger children. But those are a distinct class of cases, and they were clearly held to have no reference whatever to the ordinary case of construing a series of limitations, or construing a shifting clause; and accordingly it was there held that the words "younger son" in a shifting clause were to be taken in their plain and ordinary sense, as meaning younger in order of birth, unless it satisfactorily appeared from other parts of the will that they were used by the testator in another sense. Sir *John Leach* had come to a different conclusion, and Lord *Lyndhurst* had affirmed that conclusion on appeal, but in the House of Lords their judgments were reversed.

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(1) 2 App. Cas. 698.

(2) 1 H. L. C. 167; see also *Scarisbrick* v. *Eccleston*, 5 Cl. & F. 398.

Therefore, upon principle and authority, I take the words in their ordinary meaning, and I do so the rather because any other construction would throw out the whole scheme and devolution of this property, in events which might not improbably have happened. That really is enough to dispose of the case without reference to *Bathurst* v. *Errington* (1), except in so far as we have it stated by the learned Lords that the general rule of construction must be adhered to unless you can find from the context of the particular will that the word "eldest" was not used in its true sense, for I do not think that a case like *Bathurst* v. *Errington* really throws any further light upon this case. It was not a case of a series of limitations to the eldest or first, second, third, fourth, and so on, but the question arose upon the construction of a clause providing for the case of a son not being the eldest becoming the eldest, that is to say, of a clause which admitted that he was not literally and properly the eldest, but, contemplating the event of a change in the existing state of things. It specially pointed to this, that a person not properly answering the description of eldest might still answer that description in a sense, although not in a true sense. The Lord Chancellor seemed to consider that the words must mean become eldest during the lifetime of Sir *Thomas Stanley*, the father of the sons between whom the shifting clause was to take effect. That is not the case which we have here. There is nothing in the context of this will to require or warrant any departure from the proper and ordinary meaning of the words employed.

The consequence is, that *C. E. Treffry* is, subject to his father's life estate, the tenant in tail of this property.

(1) 4 Ch. D. 251; 2 App. Cas. 698.

With reference to the provision in the *Wills Act* against lapse, which I have stated in my opinion applies to this case, I may observe that whether that be so or not the result would be exactly the same, and I only mention that clause as fortifying the conclusion I have arrived at in favour of a complete system of limitations.

Solicitors: *Cope & Co.*; *Lambert, Petch, & Shakespeare*; *Syms & Son*; *J. E. Fox & Co.*; *Guscotte, Wadham, & Daw*, agents for *Symes & Co., Crediton*; *G. E. Phillbrick*, agent for *Ford, Exeter.*

In re SUTTON'S TRUSTS.

V.-C. H.
1879
Feb. 28.

Trustee Relief Acts—Bankers—Moneys on Deposit—Conflicting Claims—Payment into Court—Judicature Act, 1873, *s.* 25, *sub-s.* 6—*Costs.*

A banking company having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into Court under the *Trustee Relief Act*, after first deducting therefrom their costs of payment in.

Upon petition by one of the claimants for payment out:—

Held, that the proviso in sect. 25, sub-sect. 6, of the *Judicature Act* only applied to debts of which there had been an absolute assignment in writing; and that the banking company, not being trustees within the *Trustee Relief Act*, were not entitled to pay the deposit moneys into Court thereunder:

But *held*, that the Petitioner must be taken to have submitted to the jurisdiction under the *Trustee Relief Act* by petitioning the Court, and, upon the principle of *In re Haycock's Policy* (1), the bank were entitled to their taxed costs of payment in and of the petition, and such costs were directed to be taxed accordingly.

IN September, 1877, Mrs. *Margaret Sutton*, the widow of Mr. *John Sutton*, who had died a short time before, deposited a sum of £500 with the *West of England and South Wales District Bank* at *Newport*, taking from them a written receipt. Mrs. *Margaret Sutton* died in 1878, and after her death the sum so deposited was claimed both by her executor, Mr. *Vaughan*, and by Mrs. *Murphy*, the administratrix of *John Sutton*. These persons each gave the bank notice in writing of their claims, and threatened legal proceedings in default of payment. The bank then paid the £500 into Court, after first deducting therefrom the sum of £17 13*s.* 4*d.* for their costs of payment in.

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(1) 1 Ch. D. 611.

The question as to the title to the £500 having been decided in favour of Mrs. *Murphy* in an action brought in the Queen's Bench Division, an action of *Vaughan* v. *Murphy* was instituted in the Chancery Division in order to administer the estate of *John Sutton*, and in that action a receiver had been appointed.

The Plaintiff *Vaughan* now presented a petition intituled in the administration action and in the matter of the Trustee Relief Acts, and prayed that the fund in Court representing the £500 might be carried over to the credit of the administration action or paid to the receiver, and for liberty to prove in the winding-up of the bank (which had meanwhile gone into liquidation) for the costs of the payment in and of the petition, on the ground that, not being trustees within the meaning of the Trustee Relief Acts, the bank were not justified in paying the moneys into Court thereunder.

Renshaw, for the Petitioner:—

The bank are not trustees within the meaning of the Trustee Relief Acts; and that being so, they were not entitled to pay this money into Court thereunder, and they are liable for the costs of the payment in: *Matthew* v. *Northern Assurance Company* (1). The relation between a banker and a customer who pays money into the bank is merely the ordinary relation of debtor and creditor, and does not partake of any fiduciary character: *Foley* v. *Hill* (2).

W. Barber, for the Respondent, Mrs. *Murphy*.

Romer, for the liquidator of the bank:—

Matthew v. *Northern Assurance Company* was before the *Judicature Act*, under the proviso in sect. 25, sub-sect. 6, of which any debtor as to whose debt there are conflicting claims is entitled either to pay it into Court under the Trustee Relief Acts, or to call upon the claimants to interplead.

[HALL, V.C.:—The proviso only applies to "such debt," that is, to a debt of which there has been an absolute assignment in writing under the hand of the assignor, and in this case there has been no such assignment.]

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(1) 9 Ch. D. 80.

(2) 2 H. L. C. 28.

The first part of the section refers to an assignment of "any debt;" the proviso relates to two things, first, to disputes as to the assignment of "such debt;" secondly, to "any other opposing or conflicting" claims to such debt. By this it would appear that the proviso is not limited to debts of which there has been an assignment, and the section was probably intended to give the very relief which insurance and similar companies were unable to obtain by reason of the decisions that they were not trustees within the meaning of the *Trustee Relief Act*. In any case the Petitioner, having come to the Court under the *Trustee Relief Act*, cannot question the jurisdiction, or say that the payment in was not properly made thereunder: *In re Haycock's Policy* (1). The bank are therefore entitled to their costs.

Renshaw, in reply as to the case last cited.

HALL, V.C.:—

With reference to Mr. *Renshaw's* client, it appears to me that, according to the case of *In re Haycock's Policy*, the Petitioner coming here for his own purpose to get this fund paid over, petitioning under the *Trustee Relief Act*, and not repudiating the whole thing, must be taken to have submitted to the jurisdiction under the Act, and, so submitting, must pay the costs, that is to say, the ordinary costs of payment in and of appearing on this application; but as respects the sum which has been retained by the bank for their costs of payment in, those costs must be taxed in the ordinary way. With reference to the contention that the *Judicature Act* applies to this case, according to the view that I now take, it is perhaps not necessary for me to express any opinion, but I do not hesitate to say that this is not a case within the sub-section referred to. There was not an assignment of the debt here, and the proviso only applies to a case where there has been an absolute assignment in writing.

Solicitors: *Popplestone & Beddoe*, agents for *Vaughan, Newport, Monmouthshire*; *Stocken & Jupp*; *Clarke, Woodcock, & Ryland*.

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(1) 1 Ch. D. 611.

V.-C. H.

1879

March 14.

In re SHAKESPEARE WALK SCHOOL.

Public Company—Taking Lands—Lands Clauses Consolidation Act, 1845—*Costs of Petition—Charity—New Scheme—Payment of Income to New Trustees.*

A public company having taken lands belonging to a charity and paid the purchase-money into Court under the *Lands Clauses Consolidation Act*, the usual order was made for investment and payment of the income of the fund to the trustees of the charity or any two or more of them.

Afterwards, the charity having been practically superseded by the School Board, a new scheme was sanctioned whereby the charity was recast and new governors were substituted for the old trustees. The new governors then petitioned for payment out of part of the corpus towards the expenses of the new scheme, and for payment of the income of the remaining fund to the Petitioners or any two or more of them.

The company contended that they were not liable to pay the costs of a petition caused by a devolution of title subsequent to the taking of the land:—

Held, that the change of interest having been caused, not by the act of the trustees, but by the reconstitution of the charity (an incident to which all charities were liable), the company were bound to pay the costs of the petition.

IN 1855 the *London Docks Company*, now the *London and St. Katharine Docks Company*, under the powers of a special Act of 1853, which incorporated the *Lands Clauses Consolidation Act*, 1845, took the school building and premises belonging to a charity called the *Shakespeare Walk School*, and paid the purchase-money of £3600 into Court. An order in the usual form was then made upon the petition of the then trustees for investment and payment of the dividends on this sum to the trustees of the charity or any two of them. The charity having become practically superseded by the School Board in the vicinity, a scheme was sanctioned by the Charity Commissioners recasting the charity into an educational fund, with a new set of governors instead of the old trustees.

This was a petition by the new governors for the payment out of the corpus of the fund of certain expenses connected with the scheme, and for payment of the income of the remainder of the fund to the Petitioners or any two of them.

The only question was whether the company were liable to pay the costs of the petition.

Medd, for the Petitioners.

Buckley, for the company:—

The costs of this application are not costs which the company are liable to pay under the 80th section of the *Lands Clauses Consolidation Act*, 1845. It is not a case in which persons were interested in succession at the time the lands were taken; and a company taking land compulsorily is not liable to costs occasioned by devolutions of title which occur after the taking of the land whether by the acts of the parties, as by assignment, or, as here, by the settlement of a new scheme for a charity: *In re Byrom* (1); *Ex parte Vicar of Kidderminster* (2); *In re Pick's Settlement* (3); *Ex parte Hordern* (4); *Re Andenshaw's School* (5). The case of *Ex parte Incumbent of Guilden Sutton* (6) does not apply. That was not a case of derivative title, and the order made was only ancillary to and in order to perfect a former incomplete order. The principle is, that if the property is already in settlement when the land is taken, the company must pay the costs of the necessary successive applications; but if the fund is subsequently assigned over by one party interested to another, or a new interest is created by the tenant for life, then the company cannot be called upon to pay the costs of an application rendered necessary by that assignment, or the creation of that new interest.

HALL, V.C.

The cases which have been referred to, of a tenant for life assigning over his life interest or mortgaging it, or of a mortgagee of the life interest transferring his security, are not applicable to a case of this kind. Of course where a tenant for life has obtained an order for the payment to him of the income of property to which he is entitled, the company cannot be called upon to bear the costs of every order for payment of the income occasioned by all future assignments, or any one assignment of his interest. That would be an unreasonable burden. In such a case the company are clearly not liable to pay the costs. In *Re*

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(1) 5 Jur. (N.S.) 261.
(2) 7 W. R. 482.
(3) 10 W. R. 365.
(4) 2 De G. & Sm. 263.
(5) 1 N. R. 255.
(6) 8 D. M. & G. 380. 2 Jur. N.S. 793

Andenshaw's School (1), there was an order to pay the dividends of a fund in Court to the trustees of a school; then, after that, new trustees were appointed, and a petition was presented for payment of the income to those newly appointed trustees. Whether in such a case as that the company ought to pay the costs of a second application by the newly appointed trustees, there having, as was the case there, already been an order made for payment to the original trustees—whether under those particular circumstances it was right that the company should pay the costs of a second petition by the trustees so newly appointed, is a question as to which I give no opinion. It seems to have been held in that particular case that the company were only liable to pay the costs of one petition. The present case is not, in my opinion, within the authority of that case. Here is a charity entitled to property which has been compulsorily taken by a company; according to the then constitution of that charity the income of the money representing that property was ordered to be paid to the governing body or trustees of the charity. The charity afterwards, apparently from its very nature, became no longer administrable according to the original order of things, or, it may be, according to the state of things existing at the time when the property was taken by the company. Every charity is liable to come to an end, or to have its property applied *cy-près* and a new scheme adopted. In truth, the analogy of tenant for life and remainderman seems to me to be more applicable to the present case than the case of a mere transfer of interest by assignment by those who were parties to the order for payment of the dividends. I cannot, therefore, say that it was otherwise than right for the present Petitioners to come for this order at the expense of the company, and the company is accordingly liable to pay the ordinary costs in such cases, that is to say, costs according to the 80th section of the *Lands Clauses Act*.

Solicitors for Petitioners: *Maples, Teesdale, & Co.*
Solicitor for Company: *W. M. Hacon.*

(1) 1 N. R. 255.

In re BRIDGEWATER ENGINEERING COMPANY.

V.-C. H.
1879
April 5.

16 Ch D 3
17 Ch D 16
20 Ch D 26
21 Ch D 324
326

Demise of Premises to Company—Rent in Arrear—Distraint Warrant—Liquidation under Supervision—Sale by Liquidator of Company's Machinery, &c. —Claim by Landlords to be paid Rent in full—Companies Act, 1862, *s.* 87—*Bankruptcy Act,* 1869, *s.* 34—*Judicature Act,* 1875, *s.* 10.

Landlords demised premises to a company for a term, and, the rent being in arrear, they issued a warrant of distraint, but, on the request of directors of the company, did not enforce it. The company went into voluntary liquidation, and that was by order continued under the supervision of the Court. The company were possessed of machinery and other things on the premises, and after a correspondence between the parties the liquidator sold them by auction on the premises, and by order paid the proceeds of sale to a separate account.

Motion on behalf of the landlords for directions to the liquidator to pay them the rent which accrued before and after the liquidation out of the proceeds of sale, and their costs out of the assets of the company, refused, but without costs.

In re Coal Consumers Association (1) followed.

MESSRS. *PICKFORD & CO.*, the owners of the *Plymouth Foundry* premises situate at *Millbay, East Stonehouse,* demised the same to the *Bridgewater Engineering Company, Limited,* for a period of twenty-one years from Midsummer, 1876, at a rent for the first seven years of £350 a year.

It was in evidence that, the rent being in arrear, the landlords obtained a distraint warrant and sent it to their agent at *Plymouth* in November, 1877; but in consequence, as alleged, of the directors of the company, or one of them, asking them to grant further time, it being feared that there would be a great sacrifice of the property under a forced sale on the premises, and the directors paying one quarter's rent (£87 10*s.*), the landlords were induced to abstain from enforcing their right of distraint.

On the 23rd of October, 1878, the shareholders passed a resolution that the company should be wound up voluntarily, and on the 22nd of November, 1878, an order was made under the Companies Acts, 1862 and 1867, to continue the winding-up under the supervision of the Court.

The landlords claimed to be paid the sum of £437 10*s.*, being, as stated, the amount of rent due at the date of the order for winding up, and they also claimed to be paid the rent which accrued due since the winding-up, as for occupation by the liquidator of the premises.

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(1) 4 Ch. D. 625.

The machinery, plant, and chattels on the premises had cost the company, as alleged, between £3000 and £4000, and it was considered to be desirable that those things should not be sold until times improved; subject, therefore, to the approval of the Court the landlords were offered a lien for the rent due if they would hold over till good times came and accept a surrender of the lease, but that they declined to do. There was a long correspondence between the solicitors of the parties, and it appeared that on the 26th of November, 1878, the solicitors of the liquidator wrote to the solicitors of the landlords, in which, after stating that an order had been made to continue the liquidation under supervision, they said that the liquidator proposed to take possession of the machinery and chattels in order to realize them, but that the landlords must understand that he did not intend to occupy the premises so as to render the assets of the company liable for rent; and in a subsequent letter, dated the 18th of December, 1878, they said, after referring to their intimation that the liquidator did not propose to adopt the lease or pay any rent in respect of it, that the liquidator had instructed auctioneers to sell the machinery, plant and chattels on the premises, and proposed to hold the auction about the middle of January, 1879; and they added that as the landlords had some time back seemed to be under the impression that it would be for their benefit to dispose of the premises or grant a lease of them to whoever might be the purchaser of the plant, if they would like any arrangement of that sort suggested to the liquidator, their solicitors would perhaps let them hear of it at their earliest convenience. By arrangement with the landlords, with the view of finding another tenant, advertisements were issued containing an announcement that the whole of the stock of machinery might be purchased as a going concern, and that the landlords would be willing to grant a fresh lease.

A day or two before the holding of the auction the landlords threatened to distrain, and thereupon an *ex parte* injunction was obtained by the liquidator to restrain them from doing so.

The landlords moved to discharge the order, and the Court then directed the liquidator to go on with the sale of the property and to keep the proceeds of it at a bank to a separate account.

The landlords alleged that their consent to the sale and to the auction being held upon their premises was upon the express understanding that they were to be paid the rent owing to them.

The machinery, plant, and chattels were sold upon the premises for over £800, and the liquidator, as ordered, paid the net proceeds of sale to a separate account at a bank.

This was a motion on behalf of the landlords that directions might be given to the liquidator to pay the amount due to them from the company for rent of the premises to Christmas, 1878, out of the moneys deposited at the bank; and also to pay to them out of the assets of the company their costs of this application.

The further evidence is sufficiently referred to in the judgment.

Robinson, Q.C., and *Rigby*, for the landlords:—

There are two questions for consideration in this case: the right to payment of the rent which accrued due prior to the order for liquidation; and the right to payment of the rent which accrued due afterwards. The landlords clearly had a right to distrain for the rent which was due, and they would have exercised it but for the requests and promises made by the directors.

Putting aside for the purpose of argument that the company is in liquidation, the right to distrain exists as a security for the purpose of payment of any rent due to them. It is a security in the nature of a remedy given to a certain class of creditors, an it belongs to landlords in the winding-up of companies. Has that right been interfered with by the *Companies Act*, 1862? Only to the extent, that the right which exists can be enforced, but only by leave of the Court (sect. 87). Assuming that the company had been adjudicated bankrupt the landlords would still be entitled to their security, and they might under the 34th section of the *Bankruptcy Act*, 1869, at any time either before or after the commencement of the bankruptcy, distrain for the rent due to them, *i.e.*, for one year's rent which had accrued due prior to the date of adjudication, and they might prove under the bankruptcy

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for the overplus due for which the distress might not be available. The question is whether, having regard to the 10th section of the *Judicature Act*, 1875, which enacts that in the winding-up of any company under the Companies Acts of 1862 and 1867, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, the right which exists can be enforced having regard to the *Bankruptcy Act*, 1869, and the *Companies Act*, 1862, and it is submitted that the Court will in its discretion give the landlords the same benefit as would arise from the exercise of their right of distraint in bankruptcy. The Master of the Rolls in his judgment in *In re Printing and Numerical Registering Company* (1), said that the respective rights of the secured and unsecured creditors of a company in liquidation are the same as under the law of bankruptcy, and his Lordship appears to have qualified the judgment which he gave in *In re Albion Steel and Wire Company* (2), therefore the right of the landlords under the 10th section of the *Judicature Act*, 1875, was clear, and the only case against their right was that of *In re Coal Consumers Association* (3), but that was not binding upon the landlords in this case. In bankruptcy the securities of creditors must be realized first, and then proof made for the balance, but, when a company is being wound up, a creditor holding security is entitled to prove for the whole amount due to him: *Mason* v. *Bogg* (4); *Kellock's Case* (5).

As to the question of the rent which accrued after the liquidation, there is no doubt that the sale on the premises took place for the benefit of the general creditors, and therefore the landlords ought to have their rent in full. The case is governed by the decision in *In re North Yorkshire Iron Company* (6).

They also referred to *Ex parte Railway Steel and Plant Company* (7), and to *In re Norton Ironworks* (8).

(1) 8 Ch. D. 535, 538.
(2) 7 Ch. D. 547.
(3) 4 Ch. D. 625.
(4) 2 My. & Cr. 443.
(5) Law Rep. 3 Ch. 769.
(6) 7 Ch. D. 661.
(7) 8 Ch. D. 183.
(8) 26 W. R. 53.

Dickinson, Q.C., and *Romer*, for the liquidator:—

As to the first point, whether the landlords have under the 10th section of the *Judicature Act*, 1875, the right which they would have under the *Bankruptcy Act*, 1869, viz., a right of distraint for a year's rent which was due before the order for winding up, it is submitted that when the cases are examined it will be found that there is no such right. That section does not and was not intended to assimilate for all purposes the rules in bankruptcy to the rules under the Companies Acts, 1862 and 1867, and a landlord has no right given to him to distrain for rent due before the winding-up order. *In re Coal Consumers Association* (1). The three statutes must be construed together, and considering them and the authorities it is clear that under the 10th section of the *Judicature Act*, 1875, the Court cannot in the winding-up of a company give to any creditor a security which he might possess under the *Bankruptcy Act*, 1869. There is no conflict in reality in the decisions which have been arrived at in the cases of *In re Albion Steel and Wire Company* (2); *In re North Yorkshire Iron Company* (3); *In re Stockton Iron Furnace Company* (4); *In re Thérèse & Co.* (before the Master of the Rolls, 15th February, 1879)(5). As to the rent which accrued due after the order for winding up and the right to be paid in full, it is clear upon the evidence that the sale on the premises of the property there was for the benefit of all parties, and that the landlords did not seriously object to its taking place there.

And as to the landlords not having distrained prior to the winding-up, for that they had only themselves to blame, but the fact was they expected to make good terms and the negotiations failed. They did not obtain security through their own laches, and the result is that they are not entitled to any order upon this motion.

Robinson, in reply.

HALL, V.C.:—

First, as to the rent which was due to the landlords at the date of the order for winding up, I am of opinion that, notwithstanding Mr. *Robinson's* very able argument, I cannot allow the claim made by them, considering the present state of the authorities. The case is, I think, governed by that of *In re Coal Consumers Association* (1). The decision there I am, I consider, bound to follow until there be a subsequent case which treats that as not law. The Master of the Rolls, in the case of *In re Albion Steel and Wire Company* (2), refers to that case with approval. It was submitted that the Master of the Rolls had qualified his judgment in *In re Albion Steel and Wire Company* by his judgment in *In re Printing and Numerical Registering Company* (3), but his Lordship has in the latter case merely explained what he thought was not in his former judgment, *i.e.*, what he thought might be misleading in regard to secured creditors, but he did not say anything which intimated directly or indirectly that the case approved of by him, and which was decided by Vice-Chancellor *Malins,* was not sound law, and ought not to be followed. Then I come to *In re Stockton Iron Furnace Company* (4), and I am satisfied on reading the judgment of the Master of the Rolls in that case that there is nothing in it which assists Mr. *Robinson's* argument. There is no passage in that judgment which can be interpreted as meaning that landlords are secured creditors by reason of their power of distress. Lord Justice *James* towards the end of his observations said that "under the bankruptcy or under the winding-up law which may be taken together, all they get is one year's rent." His Lordship was no doubt addressing his observations to the case before him.

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(1) 4 Ch. D. 625.
(2) 7 Ch. D. 547.
(3) 7 Ch. D. 661.
(4) 10 Ch. D. 335.

5) 4 NL (1879) 31

I do not refer particularly to the earlier case of *In re Norton Ironworks* (5), as it is so shortly and perhaps imperfectly reported. Upon the whole, I follow the decision in *In re Coal Consumers Association.* Next, as regards the rent which accrued due, as submitted, subsequently to the date of the winding-up order, I am of opinion, considering the correspondence which took place, that the postponement in dealing with the machinery, plant, and chattels was to some extent for the benefit of both landlords and tenants. The case is something like that of *In re Progress Assurance Company* (1). In this case matters were in this position: the company on the one hand had the right to the machinery, plant, and chattels, and was in possession of them, and the landlords were owners of the premises which would have to be dealt with either by a surrender and giving up to them—which had been intimated during the negotiations for terms would be the result—and when they had been surrendered and given up the landlords would want another tenant for them, and it seems to have been suggested to them by the liquidator's solicitors that the lease should be sold at the auction, and they asked whether the landlords would like something put in the advertisements about the lease to the effect that the whole would be sold in one lot, and the landlords said that they would like that to be done. They were desirous that the whole should be sold in one lot, and to grant a new lease to the purchaser. That was shewn in the correspondence, and the landlords never made any claim for rent except that in some of the letters there was a reference to the rent in arrear, and that it ought to be paid before anything was touched, and that they would not forego any right as to that rent which they expected to be paid. This was a case of mixed accommodation to the landlords and to the tenants, and I cannot say that, because the machinery, plant, and chattels were sold upon the premises, the premises were used by the liquidator, and were in his sole occupation for the purposes of the liquidation. Therefore the motion will be dismissed, but without costs.

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(1) 4 Ch. D. 625.

(2) 7 Ch. D. 547.

(3) 8 Ch. D. 538.

(4) 10 Ch. D. 335.

(5) 26 W. R. 53.

Solicitors: *Thomas Beard & Sons; Trinder & Curtis-Hayward.*

(1) Law Rep. 9 Eq. 370.

V.-C. H.
1879
May 16.

In re ROBINSON'S SETTLED ESTATE.
ROBINSON *v.* ROBINSON.

[1879 R. 28.]

Equity to a Settlement—Administration Action—Further Consideration, Equity enforced before—Practice.

In an administration action, after judgment but before further consideration, a married woman, who was absolutely entitled to a share of a fund in Court representing the residuary estate of the testator, presented a petition to enforce her equity to a settlement:—

Held, that she was entitled to an immediate order, although the fund would not be actually distributable until further consideration, and the amount of her share in it had not yet been ascertained.

PETITION in an administration action.

In this action the usual administration judgment had been given and further consideration had been reserved, and the accounts and inquiries directed were being prosecuted in Chambers. Under the will of the testator one of his children, who was a married woman, was absolutely entitled, as one of his residuary legatees, to one eighth share of his residuary estate, which had been realized and brought into Court. The residuary estate would not be distributable until the order on further consideration; and the precise amount of this share had not been ascertained, but its amount was estimated as being certainly not over £1000, and probably under £600. The married woman now presented a petition in order to enforce her equity to a settlement, and prayed that the whole of her share might be settled upon trusts for herself during her life for her separate use without power of anticipation, and after her decease for her children in equal shares on attainment of twenty-one or marriage, with an ultimate remainder to her husband, according to the form of settlement adopted in *Croxton* v. *May* (1) as given in *Seton* on Decrees (2). From the evidence in support of this petition it appeared that the husband of the Petitioner had recently been declared a bankrupt, that there were six children of her marriage, and that she was in delicate health, and was about shortly to give birth to another child.

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(1) Law Rep. 9 Eq. 404.

(2) 4th Ed. p. 673.

Farwell, in support of the petition:—

Although the fund is not actually distributable at this moment, the Petitioner is absolutely entitled in possession to a share of it. It is in Court, and, the Petitioner being in delicate health, it is of great importance to her and her children that her equity should be enforced at once, without waiting for the order on further consideration.

Levett, for the trustee in bankruptcy of the husband:—

The equity only attaches to the right to receive the fund, and cannot be enforced until the fund is actually distributable, and the husband comes to the Court to get it: *Osborn* v. *Morgan* (1); *De La Garde* v. *Lempriere* (2); *Wallace* v. *Auldjo* (3); *Daniell's* Ch. Pr. (4). The wife may of course herself bring an action or institute other proceedings to establish her equity, but it cannot be enforced except at the time, when, but for those proceedings, the executor or the Court would hand over the fund to the husband. The present application is premature, and it may well be that before the order on further consideration is made the circumstances of the parties may so alter (by the acquisition of property by the lady, for instance) as that the Court would not direct the whole fund to be settled. This chance of becoming entitled to a part of the fund is one of the benefit of which the creditors of the husband ought not to be deprived, and the petition ought accordingly to stand over until the action comes on upon further consideration.

HALL, V.C.:—

There does not appear to be any authority—certainly none has been referred to—to the effect that where the fund to which a married woman is entitled is actually in possession, although not actually distributable, the Court cannot in an action by the wife herself make a decree or declaration for a settlement in favour of the wife and children. It is said that the fact that the present fund is in the hands of the Court puts a difficulty in the way of the wife taking proceedings to enforce her equity, that she cannot do that now, but must wait until the fund becomes actually distributable in some way or other by the order of the Court. But that, as it seems to me, would be a very unreasonable rule. It might be that the assets of the testator were outstanding, and then this alleged rule would necessitate a delay until they were ultimately got in, which might take a long time. It is the established practice and rule of the Court if and when it sees its way to distribute some part of an estate, to let that part be distributed; and it may be that in this case some part of the fund might at present be dealt with but for the principle on which the Court acts for the purpose of preventing many hearings of one action, of ordinarily deferring distribution until further consideration. It is, however, the constant practice to bring a case on, on further consideration, for a partial distribution only, notwithstanding that some part of the estate, as for instance the real estate, cannot be distributed; and I cannot allow equities and rights to depend on whether the action comes on on further consideration a little sooner or a little later. I do not find any authority to that effect; in fact in several of the cases to which I have been referred the distinction which was taken was between property in possession and property in reversion, and there having been a decree or no decree. It appears to me that I must hold that this petition for enforcing the Petitioner's equity to a settlement is equivalent to an action by her for such purpose, and I shall declare that the Petitioner is entitled to her equity to a settlement, and by my order direct that such sum as upon inquiry may be ascertained to be proper to be settled shall stand settled upon the trusts mentioned in the prayer of the petition, so that the settlement may be made by the order itself.

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(1) 9 Hare, 432.

(2) 6 Beav. 344.

(3) 1 D. J. & S. 643. 9 Jur. N.S. 1101.

(4) 5th Ed. p. 86.

Levett having stated that he did not desire to insist upon an inquiry being directed,

HIS LORDSHIP made the order as prayed.

Solicitors: *Pritchard, Englefield, & Co.; Bower & Cotton.*

In re ESPARTO TRADING COMPANY.

V.-C. H.
1879
May 3, 17.

Company—Winding-up—Contributory—Director—Qualification—Lapse of Time.

F. and *G.*, in July, 1866, subscribed, at the request of *N.*, whose firm was constituted a company, limited, the memorandum of association for one share each. The company was registered in September, 1866. *F.* was entered in the register for one share and *G.* for four shares. They were not, as deposed by *F.*, to incur any liability, or to pay any moneys in respect of the shares. *G.* was, by one of the articles, named a director, and appointed a managing director. By another article it was provided that every director should at the time of his appointment and thenceforth while in office hold four shares, and if he should cease to do so his office should become vacant. *G.* acted as director for about two months in 1866. *F.* and *G.* having been asked to pay the sum due on allotment and the calls, the amounts of which had been debited to them in the company's ledger, they, in November, 1867, requested the directors to cancel the shares, and at a board meeting on the 8th of November, 1867, it was resolved that the request be acceded to, and entries were made in the company's books to that effect. There were articles of association which stated that if calls were not paid the shares would be liable to be forfeited, and that the directors might extinguish or otherwise dispose of any shares which might have been forfeited. In 1876 the company, its business having in 1874 been sold to another company, was ordered to be wound up. *G.* died many years ago:—

Held, that *F.* must be placed on the list of contributories for one share and the executors of *G.* for four shares.

THE *Esparto Trading Company*, a private one, was formed in 1866 by *G.* and *J. A. Noble* for the purpose of carrying on their business. The objects of the company were the importing, selling, and dealing in *Esparto* grass and any fibrous or other material adapted for or to be used in the manufacture of paper or textile material, and the entering into all such contracts and the doing of all such things as were incidental or conducive to the attainment of these objects.

The nominal capital of the company was £200,000 in 400 shares of £500 each.

Arthur Finch and *Lemuel Goddard* signed the memorandum of association for one share each on the 13th of July, 1866, and the company was registered on the 11th of September, 1866. *Finch* was the last of eight persons who signed the memorandum.

On the 11th of January, 1867, *Finch* and *Goddard* were entered in the register for one share each and *Goddard* was also debited in the share ledger with calls upon four shares.

Finch deposed that one of the members of the firm of *Noble & Co.* requested him to sign the memorandum and articles of association in order to make up the seven persons necessary for the formation of the company, and informed him that it was a private company formed by the firm and their friends, and that he should incur no liability, and would not be called upon to pay anything for his share, and he accordingly agreed to and did do as he was requested. He never, to the best of his belief, received any notice of allotment, and he certainly never paid, nor was ever asked or required to pay, any sum of money whatsoever, either on allotment, call, or otherwise, in respect of his share. Neither did he pay any sum of money on application for such share, because he never applied for the same.

In November, 1867, he by letter requested the directors to cancel his share. The receipt of that letter was acknowledged, and it appeared that at a board meeting held on the 8th of November, 1867, it was resolved that the request should be acceded to. From that time until the receipt of the summons in the liquidation he never received any communication of any kind whatsoever from the company, or any member thereof, or from any of its officers. At the time of what was called the cancelling of the share the company was perfectly solvent and doing a profitable business, and his reason for desiring to cease to hold the share was not in any way caused by his doubting the stability of the company, but because the Messrs. *Noble* seemed to think that if he continued to hold the share he ought to pay for it.

In November, 1867, *Goddard* also requested the company to cancel his shares.

The effects, assets, and business of the company were in 1874 sold to the *Esparto Fibre Company*, and *Finch* submitted that that company bought with full knowledge of the facts.

In the minute-book of the directors there was an entry which shewed that at a board meeting held on the 8th of November, 1867, the directors agreed to cancel the one share of *Finch*. *Finch* and *Goddard* were partners in business. There was another entry in the same book which shewed that the directors agreed to cancel the shares of *Goddard.*

The papers relating to the company filed with the Registrar of Joint Stock Companies, and the summary of the capital and shares of the company, which was filed, was made up to the 8th of January, 1868, and the list of shareholders annexed to such summary did not contain the name of *Finch* or *Goddard* as being a shareholder; on the contrary, it appeared from the summary that the total amount of shares forfeited was £1000, and which, as alleged, represented the two shares of *Finch* and *Goddard* of £500 each, as *Finch* had been unable to discover that any shares other than those two had been forfeited prior to the 8th of January, 1868, and he had searched the subsequent summaries of the capital and shares and lists of shareholders filed from time to time with the Registrar, and neither the name of *Finch* nor *Goddard* appeared in any of them as a shareholder.

It also appeared in evidence that on the 11th of September, 1866, £50 became due on allotment of the shares, and that on the 24th of January, 1867, the 17th of April, 1867, and the 13th of September, 1867, further amounts in respect of calls to the amount of £200 were debited to *Finch's* account in the share ledger.

The certificate of the Registrar of the 8th of January, 1868, gave the names of the persons (thirteen in all) holding shares in the company at that date, and of persons who had held shares therein at any time during the year immediately preceding that date, but the names of *Finch* and *Goddard* were not in the list.

Goddard was elected chairman of the board of directors on the 13th of September, 1866, and it appeared that £200 became due on the allotment of four shares to him, and that the amount, together with the amount of calls, amounting in all to £800, was debited to his account in the ledger of the company.

Article of association 32 was, "that if any member fails to pay the sum payable upon allotment, or any call due on the appointed day, the directors may at any time thereafter during such time as the sum or call remains unpaid, serve a notice on him requiring him to pay such sum or call, together with any interest and expenses that may have been incurred by reason of such non-payment." And Article 33 was that, "the notice shall name a further day and the place or places on and at which such sum or call is to be paid. It shall also state that in the event of non-payment at the time and place appointed the shares in respect of which such sum or call is payable will be liable to be forfeited. And Article 35 was that, "Any member whose shares shall have been forfeited shall notwithstanding be liable to pay to the company, and the directors may enforce the payment of all sums or calls owing upon such shares at the time of the forfeiture." And Article 36 was, "The directors may sell, extinguish, or otherwise dispose of any shares which may have been forfeited for non-payment as aforesaid, or for any other reason, in such manner as they may think proper; and the directors may in their absolute discretion remit or annul the forfeiture of any of the shares which may have been declared forfeited for non-payment as aforesaid upon payment of all arrears and of all interest thereon, together with such sum of money by way of fine as the directors shall determine upon." Article 59 fixed the number of directors. By Article 60 *Goddard* was named one of the first of the directors, and was appointed one of the managing directors for the time being; and by Article 61 it was stated that, "every director of the company shall at the time of his appointment, and thenceforth during his continuance in office, hold at least four shares of the company in his own right; and if any director shall at any time cease to hold in his own right the amount of capital requisite for his qualification, his office shall thereupon immediately become vacant."

It appeared that *Goddard* attended a series of board meetings between September and November, 1866.

In November, 1876, the company was ordered to be wound up.

The matter came before the Vice-Chancellor in Chambers and was adjourned into Court, and now came on upon motion to have the names of *Finch* and the executors of *Goddard* (he having died many years ago) settled on the list of contributories for one share and four shares respectively.

Burton Buckley, for the motion:—

As to the one share each of *Finch* and *Goddard* there was an absolute contract, and each subscriber was bound to see that he was put upon the list of shareholders; for a subscriber of the memorandum agrees to become a shareholder, and so long as there are shares that can be allotted to him he must fulfil the obligation: *Drummond's Case* (1).

In *Mackley's Case* (2) he escaped being made a contributory because all the share capital was allotted to other persons. But the decisions shew that because no shares have ever been allotted to the subscriber, or that he has never been put upon the list of shareholders, it makes no difference as regards his obligations: *Evans' Case* (3); *Sidney's Case* (4); *In re London and Provincial Consolidated Coal Company* (5).

As to the three other shares for which the liquidator asks to make the executors of *Goddard* liable. It is clear that he was appointed a director; that he acted as chairman of the board of directors, and attended the meetings during a period extending over two months; and the simple point for consideration will be the construction of the articles which required a qualification for the office; and the evidence of the facts. But it is submitted, first, that the only way in which a subscriber of the memorandum can get rid of his liability is by transfer of his shares or by forfeiture in a way allowed by the articles of association. It will probably be suggested that there was a valid forfeiture here, but there was not one of the preliminaries requisite for it gone through.

The object of a power of forfeiture is that the company shall be enabled for its own benefit, and adversely to the shareholder, to forfeit his shares if he fails to pay his calls. The power cannot be used at the request of the shareholder to relieve him from shares: *Richmond's Case* (6); *Stanhope's Case* (7); *Spackman* v. *Evans* (8); *In re London and Provincial Consolidated Coal Company.* The so-called cancellation here was made in each case at the request of the subscriber. It was not an adverse forfeiture, and was not within the power.

It is further submitted that the three other shares were neces-

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(1) Law Rep. 4 Ch. 772, 780.
(2) 1 Ch. D. 247.
(3) Law Rep. 2 Ch. 427.
(4) Ibid. 13 Eq. 228.
(5) 5 Ch. D. 525.
(6) 4 K. & J. 305, 325.
(7) Law Rep. 1 Ch. 161, 169.
(8) Ibid. 3 H. L. 171, 189.

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sary to provide *Goddard* with a qualification, and that Article 61 applies to the first directors who were named in Article 60. *Kincaid's Case* (1) arose under a private Act of Parliament, where it was enacted that the qualification of a director should be the possession of twenty-five shares; and *Forbes' Case* (2), which also arose under a private Act of Parliament, which enacted that the directors should hold fifty shares. In each case the applicant was named a director in the Act, but never applied for shares and none were ever allotted to him, and yet the qualification clause was held to apply to them as original directors named in the Acts, and they were made contributories; and so it was held in *North and South Woolwich Subway Company* v. *Pym*, which was before Vice-Chancellor *Bacon* in November, 1878. There the director attempted to escape on the ground that his resignation of the office of director was accepted and his successor appointed nearly two years before he was placed on the list of contributories. Therefore, by the joint effect of Articles 60 and 61, *Goddard* was a director, and what he did constituted a contract between him and the other shareholders: *Miller's Case* (3). There the qualification clause was held by the Master of the Rolls to be applicable to the directors named in the articles, and *Miller* was one of them, and the Court of Appeal (4) affirmed the decision of the Master of the Rolls, but held that as *Miller* had retired from the directorship his shares were forfeited, and his name must be removed from the list of contributories.

In *Currie's Case* (5) the qualification clause was held applicable to the first directors, but that case is not relied upon on the general question, as there was a previous agreement to take the shares.

In *Karuth's Case* (6) he escaped from the fifty shares—the qualification of director there—on the ground that he had resigned the office before the reasonable time to which he was entitled for acquiring the shares had expired. But it is submitted that the reasonable time ceases to run as soon as the director begins to act. The decisions in *Miller's Case* and *Forbes'*

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(1) Law Rep. 11 Eq. 192.
(2) Ibid. 19 Eq. 353.
(3) 3 Ch. D. 661.
(4) 5 Ch. D. 70.
(5) 3 D. J. & S. 367.
(6) Law Rep. 20 Eq. 506, 510.

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Case (1), where the qualification clause for special reasons was held to be inapplicable to a director named in the articles, do not apply here, as the language of the clause in *Forbes' Case* that every member "shall be eligible" who held the proper number of shares could not apply to the directors already appointed.

The evidence shews that *Goddard's* name was on the register and in the share ledger, and that he was debited with allotment and calls upon four shares, the first entry being the 11th of September, 1866, the date of the registration of the company, therefore *Miller's Case* (2) is applicable.

There have been numerous recent cases in which alleged directors have escaped on the ground that the possession of the qualification was a condition precedent to election to the office, and that the election was void because the condition was not satisfied, and therefore they were never directors at all: *Hamley's Case* (3); *Barber's Case* (4); *Jenner's Case* (5); and *Biron's Case,* before Vice-Chancellor *Malins,* in May, 1878. There *Biron* had not been properly elected; but these cases do not apply here, as *Goddard* was unquestionably well appointed, being named in Article 60, and the general effect of it and Article 61 is that he agreed to be a director and to hold four shares; and an agreement to hold shares is the same thing as holding them. *Brown's Case* (6) is distinguishable.

The subscriber to the memorandum holds his shares immediately the company is registered, as otherwise there would be no shareholders until the form of allotment shall have been gone through. In the same way this director held his shares immediately upon registration. If any question should arise upon the *Statute of Limitations,* the answer will be that the liability of a contributory is a specialty under the *Companies Act,* 1862, s. 75, and that the statute, if applicable, has not run; but I would say that it does not apply at all: *Forbes' Case* (7); *Sidney's Case* (8); *Levick's Case* (9); and *In re London and Provincial Consolidated*

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(1) Law Rep. 8 Ch. 768.

(2) 3 Ch. D. 661, 665.

(3) 5 Ch. D. 705.

(4) 5 Ch. D. 963.

(5) 7 Ch. D. 132.

(6) Law Rep. 9 Ch. 102.

(7) Ibid. 19 Eq. 353.

(8) Ibid. 13 Eq. 228.

(9) 40 L. J. (Ch.) 180. W N (1870) 271

Coal Company (1). Therefore I submit that *Finch* ought to be placed on the list of contributories for one share, and the executors of *Goddard* for four shares.

Sturges, for the alleged contributories:—

In this case lapse of time ought to be of consequence, especially as *Goddard* has been long dead. The question of qualification must be decided upon the construction of the articles. The principle contained in *Forbes' Case* (2) is that upon which we rely. Both *Finch* and *Goddard* were in the printed papers named for one share each. The entries of the other three shares in *Goddard's* name were informal. *Primâ facie* it was not intended that *Goddard* should hold four shares at the time of his appointment to the office of director. Besides *Goddard* there were three other managing directors, viz., *Routledge*, who had four shares, *Noble* thirty, and *Murray* four; and an article of association stated that they should remain, and be bound to remain, managing directors for a period of five years from the date of incorporation of the company, therefore it may be said that what applied to them applied also to *Goddard*, but his case was very different, for if Article 61 referred to him he either never became a director, not having the qualification at the time of his appointment, or on being appointed his office became vacant under the latter part of the article.

It is not necessary to refer to all the cases decided upon the question of qualification, as the decision in *Jenner's Case* (3) shews that *Goddard's* acting as a director for the short period of two months is no evidence of a contract to take the three shares. Whether *Goddard* was properly or improperly appointed a director he certainly never applied for or had the qualification for the office, and there was nothing which bound him to hold four shares. It is submitted that if there were he never was appointed a director, but if it were intended that he should be one, then he ought to have had reasonable time to accept the shares, and before that had run he requested the directors to relieve him. *Currie's Case* (4) turned upon the express agreement with the directors.

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(1) 5 Ch. D. 525.

(2) Law Rep. 8 Ch. 768, 774.

(3) 7 Ch. D. 132.

(4) 3 D. J. & S. 367.

This case is stronger than *Hamley's Case* (1), as no allotment was ever made to *Goddard*. He was never registered as a shareholder of more than one share, and his name was not returned to the Registrar. He was not in the list for the three shares: *Hallmark's Case* (2); *Burkinshaw* v. *Nicolls* (3). As to these additional shares, *Kincaid's Case* (4) and *Forbes' Case* (5) do not apply, as they turned upon special Acts of Parliament.

As to the cancellation or forfeiture, that duly took place under the provisions of Articles 34 and 36, and was good in each case. The facts were that *Finch* and *Goddard* were asked to join the company, and they agreed to do so provided they were not called upon to pay anything. The business of the company was carried on for a few months. The share ledger shews that the calls were unpaid, and the shares became liable to forfeiture for non-payment of them. *Finch* and *Goddard* were told that they must pay the calls, and their answer was the understanding that they were not to pay anything; if otherwise, they asked that the share in each case should be cancelled, and that was done, both in the register of shareholders and in the share ledger, and from that time, November, 1867, to the present year they heard nothing more of the transaction. *Finch's* evidence is clear upon the facts, and the books of the company and the return made to the Registrar, in which the shares were entered as forfeited on the 8th of January, 1868, confirm it. There was non-payment of the calls made, and the articles, taken together, shew clearly that the directors had power to extinguish the shares. The question between *Finch* and *Goddard* and the company was a *bonâ fide* one. They were induced to join under a certain condition which the company afterwards wished not to carry out, and they declined to be members of it longer. That was acceded to, and they ceased to be members of the company. *Snell's Case* (6), *Wright's Case* (7), and *Bath's Case* (8) shew that the company had power to enter into and effect a compromise of a doubtful claim, and this was one. The lapse of time is not immaterial, and the Court will presume

(1) 5 Ch. D. 705.
(2) 9 Ch. D. 329.
(3) 3 App. Cas. 1004.
(4) Law Rep. 11 Eq. 192.
(5) Law Rep. 19 Eq. 353.
(6) Ibid. 5 Ch. 22.
(7) Ibid. 7 Ch. 55.
(8) 8 Ch. D. 334.

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the regularity of what was done: *Kincaid's Case* (1); *Karuth's Case* (2); *In re Hoylake Railway Company, Ex parte Keightley*, before Vice-Chancellor *Malins* in January, 1874.

It may be difficult to dispute the original liability for one share each, but reliance is placed on the forfeiture. It was said that the forfeiture was bad because certain preliminaries were not observed, but they were not compulsory. Article 32 said that the directors "may" take the steps they did take.

In *Richmond's Case* (3) there was no power, as here, to "extinguish" shares, and besides, the cancellation was made secretly, and when the company was *in extremis*. Here the forfeiture was in consequence of the agreement that *Finch* and *Goddard* should not pay anything, and of the refusal to pay the calls, which was *bonâ fide*, and when the company was in good credit, ten years before the order for winding up, and it was brought before the shareholders in the most public manner. In *Miller's Case* (4) he was not placed on the list as the liquidator failed to establish his point.

In *Stanhope's Case* (5) and in *Spackman* v. *Evans* (6) the cancellation was purchased, but *Finch* and *Goddard* never paid anything. The distinction between those cases and the present is similar to that pointed out in *Stanhope's Case* between that case and *Lord Belhaven's Case* (7), as they always refused to pay. In *In re London and Provincial Consolidated Coal Company* (8) there was no power of forfeiture or surrender at all, as there was in *Snell's Case* (9).

It is submitted, therefore, that *Goddard* was not liable as a director, having no qualification shares, and that as to the one share for which each *Finch* and *Goddard* subscribed, there was a cancellation or forfeiture properly effected, and neither the former nor the executors of the latter ought now to be placed on the list of contributories. It is agreed that there is at present no question as to the *Statute of Limitations*. But lapse of time will influence the Court in holding that the proceedings were regular, and were known and assented to.

(1) Law Rep. 11 Eq. 192.
(2) Ibid. 20 Eq. 506.
(3) 4 K. & J. 305.
(4) 5 Ch. D. 70.
(5) Law Rep. 1 Ch. 161.
(6) Ibid. 3 H. L. 171.
(7) 3 D. J. & S. 41. 11 Jur NS 572
(8) 5 Ch. D. 525.
(9) Law Rep. 5 Ch. 22.

Buckley, in reply, pointed out that the cancellation in the books relating to *Goddard* was of "shares" in the plural, and not of "share," as in *Finch's* case.

Hall, V.C.:—

I have to determine whether Mr. *Finch* shall be placed upon the list of contributories for one share, and whether the executors of Mr. *Goddard* shall be placed upon it for four shares or for one share, or not at all.

As to the one share for which it is sought to place *Finch* upon the list, and one of the four shares for which it is sought to place *Goddard's* executors upon it, the case is the same.

Finch and *Goddard* signed the memorandum of association for one share each, and the contention on behalf of the former, and of the executors of the latter, is that the two shares were forfeited under the provisions contained in the articles of association, which, it was submitted, empowered the directors to forfeit shares for non-payment of calls.

I am of opinion that there is no ground for that contention. The directors never acted or affected to act under that power. They acted, not because *Finch* and *Goddard* could not pay their calls, but because they were requested to cancel the shares. And to shew that such a request cannot be effectually acted upon, I need only refer to the judgment of Lord *Cranworth* in *Stanhope's Case* (1). It was also contended that the case might be treated as one of release as upon a compromise, but there is no foundation for the suggestion that this was a case of compromise. It would rather seem that the real ground for the argument that there was a cancellation was, that there had been something said as to their not being under liability if they would take shares.

The length of time which has elapsed since the attempt at cancellation was urged as a reason why they should not be placed upon the list of contributories, but I cannot attend to this. It suffices for me to mention *Stanhope's Case* and *Spackman* v. *Evans* (2).

It was said that in the return which was made to the Registrar's office £1000 shares are set forth as having been forfeited, and that that £1000 described the two shares; but, I consider that, if that

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(1) Law Rep. 1 Ch. 161.

(2) Law Rep. 3 H. L. 171.

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was so, the attempt at cancellation being inoperative, so also was the statement in the return which was made, that they were cancelled. Moreover, the return which was made does not shew whose shares had been forfeited, so that persons searching the register would not be thereby informed that *Finch* and *Goddard* had had their shares forfeited. I therefore hold that *Finch* must be placed upon the list for one share, and the executors of *Goddard* for one share at least.

As to the three other shares for which it was contended that the executors of *Goddard* should be put on the list, and which with the one share make together four shares, the liquidator has submitted that *Goddard* must be taken to have acquired the four shares as the qualification of a director. Of the 59th, 60th, and 61st clauses of the articles of association, the 61st clause is the important one. Does it apply to *Goddard* who was appointed a director by the 60th clause? The words are not the same as in the cases in which the words of the qualification clause have been such that the holding of shares previously to the appointment was essential, *i.e.*, a condition precedent to the appointment; and *Hamley's Case* (1) and *Jenner's Case* (2) are cases of that kind. In those cases the articles of association provided that no person should be qualified to be a director who was not a holder of shares. So in *Stock's Case* (3) the words were, no person "shall be eligible" as a director of the company, unless he shall hold in his own right fifty shares at least. In the present case the words "shall at the time of his appointment" exclude, as regards the directors appointed by the Article 60, of whom *Goddard* was one, a subsequent acquisition of shares, which in cases where the holding of the shares was not, upon the construction of the articles, a condition precedent to appointment, has been held to be sufficient. In *Forbes' Case* (4) there was in the articles of association a clause that any member holding not less than fifty shares "shall be eligible" as a director, and then followed a clause naming certain persons, and any other qualified persons named by them, directors until the first meeting. It was held, as in *Stock's Case*, that the qualification was inapplicable to

(1) 5 Ch. D. 705.

(2) 7 Ch. D. 132.

(3) 4 D. J. & S. 426. 10 Jur N.S. 812.

(4) Law Rep. 8 Ch. 768, 770.

the named directors: "shall be eligible" excluded from the qualification clause persons who had not to be "elected." Ordinarily a qualification clause has been held to apply to directors named in the articles. This is a question of construction. In *Forbes' Case* (1), the articles provided that the qualification of a director should be fifty shares. This was held by the Master of the Rolls to apply to directors named in the Act of Parliament.

The decisions in *Kincaid's Case* (2), and *Portal* v. *Emmens* (3), and *Miller's Case* (4), are similar.

In this case I think that the words "shall at the time of his appointment" do not exclude the directors named in the articles. *Goddard* did, I consider, hold from the date of his appointment four shares, that is, the one he signed the memorandum of association for and three others. I say here, as the Master of the Rolls said in *Miller's Case* (5), "There is no exception there of the first directors," *i.e.*, express exception; nor are they, I think, impliedly excepted. Lord Justice *Mellish*, in *Portal* v. *Emmens* (6), said, "and the meaning of the Act is, that directly the Act passed, he did become a director and the possessor of that number of shares;" so here, I think directly *Goddard* was appointed he became a director and holder of four shares. It was, indeed, contended that a subsequent clause of the articles of association shewed that clause 61 did not apply to persons named in the articles, it being said that managing directors might sell their shares although bound to remain managing directors for five years. I think, however, that this does not sufficiently shew that the managing directors named in the articles were not to have the required qualification. That clause ought, I think, if necessary, to operate as a restriction upon a managing director transferring his shares, so as to leave him the holder of fewer than four shares.

In fact, all the three managing directors named in the articles, and *Barron*, the only other director, acquired the qualification of at least four shares.

I may further observe that in affidavits filed on behalf of *God-*

(1) Law Rep. 19 Eq. 353.
(2) Ibid. 11 Eq. 192.
(3) 1 C. P. D. 201.
(4) 3 Ch. D. 661; 5 Ch. D. 70.
(5) 3 Ch. D. 664.
(6) 1 C. P. D. 669.

dard's executors, it is deposed that he never qualified as a director, which assumes that qualification by him was necessary, but the fact is *Goddard* became the chairman of the board of directors and filled that office for a considerable time, and although he was only entered in the share register for one share, an account was opened with him in the ledger of the company which treated him as having acquired and being the owner of four shares, and he was therein debited with the sum payable on allotment of four shares and with two calls on four shares.

I think that *Goddard*, acting as he did as a director, must be taken to have known what was done in the management of the affairs of the company: *Brown's Case* (1). The books of the company are *primâ facie* evidence against both *Finch* and *Goddard*: sect. 154 of the *Companies Act*, 1862. The minute book and ledger of the company and share register have been referred to during the arguments, and are evidence. It appears that the directors were requested by *Goddard* to cancel his shares, not his share. That shews he considered that he had the four shares.

What I have said in reference to *Goddard's* one share, as to the forfeiture and compromise and length of time, applies to the three shares. The three shares not being entered in the company's share register or returned to the Registrar's office, is, I think, unimportant, particularly when I consider *Goddard's* position as chairman of the board of directors, which imposed upon him the duty of having the register return perfectly kept and made.

Solicitors: *Hillearys & Taylor; Hyde, Tandy, & Mahon.*

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(1) Law Rep. 9 Ch. 102, and the judgment of Lord *Selborne*, p. 106.

In re WALKER'S ESTATE.
CHURCH *v.* TYACKE.

[1876 W. 131.]

V.-C. H.
1879
May 29.

Will—Gifts to Son and Daughters for Life and to their Children—"Die without leaving issue"—"Their surviving child or children"—Children of Deceased Children entitled.

19 Ch D 18
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Testator gave the residue of his real and personal estate to trustees in trust, after paying the income unto his wife for life, for his son and five daughters during their respective lives, equally to be divided between them as tenants in common (except that his eldest daughter should have a double share), the share of each daughter to be for her separate use; and after the respective decease of each of his children the share or shares to which he, she, or they might be entitled of and in his estate should be in trust for his, her, or their child or children equally, to be a vested interest at twenty-one years of age; and there was a proviso that if any or either of his children should die without leaving issue him or her surviving who should live to attain the age of twenty-one years, the share or shares to which any or either of his children should be entitled of and in his estate should thereupon be held in trust for his then surviving child or children in such manner and form in all respects as declared with regard to the share or shares originally given to him, her, or them. Power was given by the testator, after the death of his wife, for the major part in number of his then surviving children by any writing to appoint new trustees or a new trustee.

The son and daughters survived the testator:—

Held, that of the shares of two daughters who died subsequently to the son, without leaving children, the children of the son were entitled to one third.

THE writ in this action was issued in April, 1876.

Joseph Walker, who died on the 8th of January, 1848, by his will dated the 17th of March, 1842, after bequeathing to his wife, *Eleanor Walker*, for her life the use of his household furniture and other things; gave the residue of his real and personal estate to two trustees, named (one being his son *S. M. Walker*), upon trust to pay the rents and income unto his wife, or to permit her to occupy the premises during her life for her separate use, and then said: "And from and after the decease of my said wife I will and direct that all my real and personal estate shall be held by my said trustees in trust for my said son

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(*Samuel Masterson Walker*) and my five daughters during their respective lives equally to be divided between them as tenants in common (save and except that my eldest daughter *Mary* shall have double the portion or share of any other of my said children of and in my said residuary real and personal estate)." After directing that the share of each daughter should be for her separate use the testator said: "And from and after the respective decease of each of my said children the share or shares to which he, she, or they may be entitled of and in my said residuary real and personal estate shall be in trust for his, her, and their child or children equally (if more than one), to be a vested interest in him or them on attaining the age of twenty-one years, and be transferred and made over accordingly, and in the meantime applied in and towards the maintenance, education, and advancement of such child or children. Provided always, that if any or either of my said children shall depart this life without leaving issue him or her surviving who shall live to attain the age of twenty-one years the share or shares to which any or either of my said children shall be entitled as aforesaid of and in my said real and personal estate shall thereupon be held by my said trustees in trust for my then surviving child or children in such manner and form in all respects as is hereinbefore declared with regard to the share or shares originally given to him, her, or them." Then, after empowering the trustees to lease his lands or houses, and with the consent of his wife to sell all or any part of them, and to invest the proceeds, as in the will mentioned, and to hold the funds upon the trusts thereinbefore declared, the testator added a proviso that if the two trustees or either of them should die or be desirous to quit, or be discharged from or refuse or become incapable to act in the trusts, it should be lawful to and for his said wife, during her life, and after her decease for the major part in number of his then surviving children, by any writing to appoint new trustees or a new trustee in their or his place.

The testator left him surviving his son, *S. M. Walker*, and his five daughters, viz., *Mary Walker*, *Margaret Jenkins*, *Eleanor Elgee*, *Josephine Tyacke*, and *Fredericka Frances Church*.

Margaret Jenkins died on the 18th of March, 1868, without issue.

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Samuel Masterson Walker died in February, 1874, leaving three children surviving and still living.

Mary Walker died on the 31st of October, 1874, without issue.

Eleanor Elgee died on the 15th of July, 1875, without having had any child.

Josephine Tyacke has five children now living, and *Fredericka Frances Church* has two children.

The action was to have the trusts of the will carried into execution by the Court. This was the hearing on further consideration.

Bevir, Q.C., and *G. Daw*, for the Plaintiffs *F. F. Church* and family:—

The language of the will must be construed literally. The testator evidently contemplated that one child might be the survivor, and that the proviso in the will might take effect: *Milsom* v. *Awdry* (1). A sterpital construction of the language of the will would be a forced construction, and one which the Court does not arrive at when it considers that the language fairly means something else: *Ferguson* v. *Dunbar* (2). The tendency of the Courts is to read "survivor," "survivors," or "surviving," in its natural sense, and not to give effect to it as to "other" or "others": *In re Corbett's Trusts* (3).

It should be noticed that in the last part of the will there is a proviso that if the trustees should die or refuse to act, it should be lawful for the wife, and after her death for the major part in number of his then surviving children, to appoint a trustee or trustees in their or his stead.

There have been many recent decisions, and amongst them *Badger* v. *Gregory* (4), and *Wake* v. *Varah* (5); but they are all distinguishable from the present case. It is submitted that the Plaintiff *F. F. Church* is entitled to one half of the two shares of the sisters who died in October, 1874, and July, 1875.

Phear, for *J. W. Tyacke*, adopted the arguments offered on behalf of Mrs. *Church*. He referred to *Waite* v. *Littlewood* (6), and *Cooper* v. *Macdonald* (1), and pointed out that they were distinguishable in a material element, viz. the gift over, which the Courts had made a ground for the decisions which had been arrived at.

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(1) 5 Ves. 465.
(2) 3 Bro. C. C. 469, n.
(3) Joh. 591. 6 Jur NS. 339
(4) Law Rep. 8 Eq. 78.
(5) 2 Ch. D. 348.
(6) Law Rep. 8 Ch. 70.

Northmore Lawrence, for the *Tyacke* family, and

R. Morris, for parties in the same interest.

Crossley, for the widow of *S. M. Walker*.

Hastings, Q.C., and *Millar*, for the children of *S. M. Walker*:—

In using the words "in trust for my then surviving child or children," the testator must have intended to include in them the family of each surviving child. It was not an absolute gift to his children, and afterwards cut down, but a gift of the residue of the whole estate to trustees in trust after the death of the wife to divide the income of the property between the son and five daughters during their respective lives. That, it is submitted, was not an absolute gift, but a gift for life of an interest in a share.

In case of the death of a child without issue, the share or shares to which any or either of his children should be entitled was thereupon to be held in trust for his then surviving child or children, in such manner and form as was declared with regard to the share originally given to him, her, or them. Effect must be given to the whole of the will. The gift is one to a child, with remainder to that child's issue; and it was not to go to the surviving children absolutely. The words "then surviving child or children" are capable of expansion into "and their issue." The word "child" represents not only the child, but the stirps as well. The true meaning is that such child took a life interest, with remainder to his or her issue: *In re the Trusts of Colshead's Will* (2); *Waite* v. *Littlewood* (3); *Wake* v. *Varah* (4); *Lucena* v. *Lucena* (5); *In re Arnold's Trusts* (6); *Hodge* v. *Foote* (7).

[HALL, V.C., referred to *Beckwith* v. *Beckwith* (8).]

(1) Law Rep. 16 Eq. 258.
(2) 2 De G. & J. 690.
(3) Law Rep. 8 Ch. 70.
(4) 2 Ch. D. 348.
(5) 7 Ch. D. 255.
(6) Law Rep. 10 Eq. 252.
(7) 34 Beav. 349.
(8) 46 L. J. (Ch.) 97; 25 W. R. 282; 36 L. T. (N.S.) 128.

Bevir, in reply.

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HALL, V.C.:—

I must give a judgment which will be, upon the whole, most consonant with the weight of authority to be found in the different judgments which have been delivered in these cases.

As has been truly said, in at least three of the cases, where the non-literal interpretation was adopted, there was no gift over.

Those were cases which were before the Courts of first instance; still the judgments delivered were by Judges of very great authority, and I cannot, when considering the judgment delivered by Lord *Selborne* in the case of *Waite* v. *Littlewood* (1), and the grounds upon which he rested it, and his reasoning in that case, avoid applying those judgments to the present case; for although there was a gift over in *Waite* v. *Littlewood*, it is worthy of observation that it does not appear in the head-note, and in one of the subsequent cases which have been referred to it was treated as if there had been no gift over in that case. That is a singular thing, but the reasoning of Lord *Selborne* in that case is in my opinion applicable to a case like the present. So in the case of *Lucena* v. *Lucena* (2), the judgment delivered by the Master of the Rolls certainly, and his reasoning in it, are favourable to a broad reading of the words in this case. The same may, I consider, be said of the judgment delivered by Lord Justice *Cotton* in that case, for he stated two grounds which might be relied upon, and I do not find him saying that either might not suffice. In fact, I should rather read his judgment the other way. It seems to me that good sense in a case like the present requires that a broad reading should be adopted, although there is no gift over.

As regards the case of *Beckwith* v. *Beckwith* (3) which has been referred to and relied upon, I cannot look upon it as a decision that in the circumstance of the absence of a gift over, a broad reading of the words would not be adopted. All the authorities are in favour of that reading, and therefore I put that construction upon this will. I may observe in reference to the reliance placed upon the precise form of words, "then surviving child or children," it is clear that

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(1) Law Rep. 8 Ch. 70.

(2) 7 Ch. D. 255.

(3) 46 L. J. (Ch.) 97; 25 W. R. 282; 36 L. T. (N.S.) 128.

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there is nothing in those words when properly considered which cannot be explained, inasmuch as shares might accrue, and it was possible there would be only one child to take. The words "then surviving," have no special signification by virtue of the word "then." I observe that in the case of *Cooper* v. *Macdonald* (1) there was the same circumstance "or if there be only one of my said children then living." The expression "then living" did not vary the construction in that case, and so here the words "then surviving child or children" do not vary it. Reading the clause as so framed, and construing it as carrying over accruing shares, there might be only one surviving child to take under that disposition. The occurrence of the words "then surviving children" in the proviso giving power to appoint new trustees is too minute a circumstance to be considered, and further, the clause is of quite a different character from the former one; besides the power given there was unquestionably a personal matter, and the exercise of it must receive the ordinary interpretation. As I have already observed, the use of the word "surviving" immediately before the important words in this case appears to me to be in favour of the view which I have adopted, because the word "surviving" is used in the words "without leaving issue him or her surviving," and certainly it would not be construed so as to exclude from taking those children who had attained a given age, although they did not survive their parents, the trust being for them without reference to that event, and that particular clause being a proviso, must, I apprehend, be read so as to harmonise with the particular trust which gives the children in terms vested interests on attaining the age of twenty-one years; therefore I hold that children of the son are entitled to a third of these two shares, and that they become vested interests at twenty-one years of age. There will be a declaration to that effect.

Solicitors: *Coode, Kingdon, & Cotton,* agents for *T. W. Gray, Exeter; Gregory, Rowcliffes & Rawle,* agents for *J. Walker Tyacke, Helston; Syms & Son,* agents for *Radford, Sidmouth; Sandys & Trevenen.*

(1) Law Rep. 16 Eq. 258.

In re LYNALL'S TRUSTS.

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1879

July 18, 25.

Will—Legacy—Mortmain—Bequest of Stock to pay off Charges on Almshouse.

A testatrix bequeathed stock to trustees to be applied " for or towards payment of all or any debt or debts, dues, demands, charges, or claims whatsoever, which may be owing or chargeable upon or in any manner claimable against " an almshouse situated on land in mortmain :—

Held, that the bequest was void under the *Statute of Mortmain* (9 Geo. 2, c. 36), as in substance a gift of stock to be laid out or disposed of in the purchase of a charge or incumbrance affecting land in mortmain.

Corbyn v. *French* (1) and *Waterhouse* v. *Holmes* (2) followed.

PETITION under the Trustee Relief Acts.

Mrs. *Sarah Lynall*, by her will, dated in 1823, bequeathed to her servant, *Hannah Hoyles*, an annuity of £20 during her life, and directed her trustees and executors to appropriate and transfer into their names so much stock in the public funds as would answer the annuity. By a codicil, also dated in 1823, the testatrix directed her trustees and executors, after the decease of *Hannah Hoyles*, to "pay, assign, and transfer the sum of £666 13*s.* 4*d.* £3 per Cent. Reduced Bank Annuities, being the amount in value at par of the said annuity, into the name of Dr. *John Rippon*, his executors, administrators, or assigns, to be by him or them applied for or towards the payment and discharge of all or any debt or debts, dues, demands, charges, or claims whatsoever, which may be owing or chargeable upon or in any manner howsoever claimable against" a certain almshouse belonging to a particular Baptist church and congregation meeting in *Great Carter Lane*, then under the pastoral care of Dr. *John Rippon*.

Hannah Hoyles, the annuitant, having recently died, the trustees and executors of the testatrix transferred the stock representing the £666 13*s.* 4*d.* into Court under the Trustee Relief Acts, and the present trustees of the almshouse now petitioned that the fund might be sold, and the proceeds paid to them to be applied in the payment of certain expenses already incurred, and of other expenses urgently required, for the repairs of the almshouse; or that provision might be made for the payment from time to time

(1) 4 Ves. 418.

(2) 2 Sim. 162.

V.-C. H.
1879
In re
LYNALL'S
TRUSTS.

out of the fund of all debts, demands, charges, or claims which might be owing or chargeable upon or claimable against the almshouse.

The almshouse was held for charitable uses, but it did not appear that there was any charge or incumbrance by way of mortgage, either legal or equitable, affecting it.

W. Pearson, Q.C., and *Millar*, for the Petitioners.

Robinson, Q.C., and *Thomas*, for the Respondents, the residuary legatees, and the trustees under the will:—

The words of the bequest point expressly to debts in the nature of charges upon the almshouse, as an almshouse, and the stock in question cannot under the terms of the gift be applied in payment of any debt due from the trustees personally.

This is, in fact, a legacy to be applied in the purchase of an interest in land in mortmain, or a charge or incumbrance affecting the same, and so, in giving the trustees a larger or more extensive interest than they had before. It is therefore void under the *Mortmain Act*, 9 Geo. 2, c. 36; and this is the case whether the debt is due upon a legal mortgage, as in *Corbyn* v. *French* (1), where the legacy was to be applied towards the discharge of a mortgage on a chapel; or upon an equitable charge, as in *Waterhouse* v. *Holmes* (2), where the bequest was "for or towards the paying off and discharging any debt or sum of money which may be due or owing upon a meeting-house." This is a different case from *Edwards* v. *Hall* (3), for there the bequest was for the purpose of endowing existing churches or chapels, which had not the effect of bringing any fresh interest in land into mortmain, and so was perfectly good.

The fund in Court accordingly belongs to the persons entitled to the residue of the testatrix's estate.

W. Pearson, in reply:—

All that *Waterhouse* v. *Holmes* decided is that there is no difference in this respect between a legal and an equitable mortgage upon a charity. But in that case and in *Corbyn* v. *French* there was an actual mortgage debt, either legal or equitable, charged upon the charity. All that was in mortmain therefore was the equity of redemption, and accordingly, if the mortgage debt was paid off by means of the bequest, a larger interest, *i.e.*, the fee simple, would be brought into mortmain, and this would no doubt be void within the statute. But these cases have no application to the present, where the whole property is already in mortmain, where there is no legal or equitable mortgage affecting it, and where the liability of the trustees for these repairs is personal only.

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(1) 4 Ves. 418. (2) 2 Sim. 162. (3) 6 D. M. & G. 74. 1 Jur NS
1189,

July 25. HALL, V.C.:—

It appears to me that the words of the codicil confine the application of the fund to the payment or discharge of incumbrances upon or liabilities affecting the charity estate, and do not extend to paying for repairs or to reimbursing any one in respect of personal liability only.

I think that the case is governed by *Corbyn* v. *French* (1) and *Waterhouse* v. *Holmes* (2), and that the intended disposition is void by reason of the *Statute of Mortmain.* The fund, therefore, belongs to the persons entitled to the residue of the testatrix's estate. Of course the costs will come out of it.

Solicitors: *Watson, Sons, & Room; Hollams, Son, & Coward.*

(1) 4 Ves. 418.

(2) 2 Sim. 162.

FRY, J.

1879

May 12, 13, 14, 15, 19.

ATTORNEY-GENERAL *v.* TOMLINE.

[1878 A. 105.]

Use of Land—Injury to Neighbouring Landowner—Foreshore—Removal of Shingle—Overflow of Sea—Prerogative of Crown—Defence of Realm against Sea—Power to prevent Removal of Natural Barrier.

Semble, that the owner of the foreshore in removing shingle therefrom for the purpose of sale, is using his land in a natural, not in a non-natural way, and would not, therefore, be on this ground responsible to a neighbouring landowner for the damage resulting from a consequent overflow of the sea.

But it is part of the prerogative, and it is the duty, of the Crown to preserve the realm from the inroads of the sea, and a subject is therefore not entitled to destroy a natural barrier against the sea.

Accordingly, in an action by the Attorney-General, on behalf of the Crown as owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the Defendant, the owner of the foreshore, from removing shingle therefrom so as to endanger the Crown land or expose it to the inroads of the sea.

Affirmed on appl 14 Ch.D. 58. C.A.

THIS was an information by the Attorney-General on behalf of the Crown, and an action by the Secretary of State for the War Department as Plaintiff, against Colonel *George Tomline*, the lord of the manor of *Felixstowe Priory*, in the county of *Suffolk*.

The statement of claim alleged that the Plaintiff was seised in fee simple, in trust for Her Majesty, of certain land, situate near *Felixstowe Priory*, which formed the site of and the inclosure surrounding a martello tower, known as the *U Tower*. The east side of this land immediately adjoined the sea-shore in the estuary and near the mouth of the river *Deben*. The Defendant was the lord of the manor within which the land was situate, and as lord of the manor he claimed to be the owner of the foreshore. The eastern portion of the Plaintiff's land lay very low, and was frequently below the level of the sea at high water in spring-tides. The shingle bank on the beach formed a natural barrier which protected the land from the sea, and was the only barrier which prevented the sea from incroaching on the Plaintiff's land. The Defendant had for some years past sold to ship-masters and other persons, and authorized them to take and carry away, and they had in fact taken and carried away, very large quantities of shingle and sand from the beach, both in front of and above and below the Plaintiff's land, for ballast. In consequence of the continued removal of the shingle the north-east corner of the Plaintiff's land was in immediate danger of being flooded by the sea, and, if the removal of the shingle was continued in the manner in which it had been theretofore carried on, the whole natural barrier of shingle would be destroyed, and the Plaintiff's land would be left unprotected from and exposed to the inroads of the sea, and would be liable to be washed away, and the continued existence of the land as land, and the stability of the *U Tower* itself would be greatly endangered. The informant and Plaintiff claimed an injunction to restrain the Defendant from removing the shingle.

By his statement of defence the Defendant denied the title of the Plaintiff to the land forming the inclosure and site of the *U Tower*, and said that the land was part of the waste land of the manor, and belonged absolutely to the Defendant as lord of the manor. He said that the shingle and sand referred to in the statement of claim had been taken away under his authority, in exercise of his proprietary rights as owner of the foreshore. It had, however, always been taken from the beach between the shingle bank and the sea, and none of it had ever been taken from the bank itself, and he said that no shingle or sand had been removed from the beach at the point mentioned in the statement of claim, or anywhere near the point, since the 11th of October, 1877. He denied that any part of the *U Tower* land was in danger of being flooded by the sea in consequence of the removal of shingle by him, or otherwise than by the operation of natural causes, and he denied that the removal of the shingle in the manner in which it had been theretofore carried on would destroy or affect the natural barrier of shingle, or would tend to leave the *U Tower* land unprotected from or exposed to the inroads of the sea, or liable to be washed away, or to endanger the existence as land of the *U Tower* land or any part of it, or the stability of the tower. He said that the tower itself stood considerably above the level of the sea, even at high spring-tides, and was not in any degree exposed to danger from the action of the sea.

The informant and Plaintiff joined issue on the statement of defence.

This was the trial of the action.

The facts and the effect of the evidence are fully stated in the judgment of the Court.

Sir *J. Holker*, A.G., Sir *H. Giffard*, S.G., and *J. Rigby*, for the Crown:—

The bank of shingle is the natural barrier against the sea, and the Defendant is not entitled to use his own property in such a way as to injure the property of the Crown. Putting the right of the Crown simply as that of a landowner (though without abandoning any right which it may have by virtue of its prerogative), if there is a natural bank of a river or the sea, the owner of it has no right to take it away so as to cause water to flow on to his neighbour's land. No doubt a man may do what he likes on his own land, but this is subject to the qualification that he must not injure his neighbour's land: *Smith* v. *Fletcher* (1). Lord *Penzance*, in his judgment, laid down three propositions. One of them is enough for us, *i.e.*, that a man who alters the natural course of a stream and makes an artificial one is bound to make it as capacious and efficient as the natural course. *A fortiori*, he is responsible if he destroys the natural course and makes no artificial course in lieu of it, if he simply cuts the bank or removes it and lets out the water to the injury of his neighbour. No doubt in *Hudson* v. *Tabor* (2) it was held that the owner of land fronting a creek is under no obligation to maintain an artificial sea-wall to keep the water from overflowing his neighbour's land, but that was an artificial, not a natural, barrier.

[FRY, J.:—There may be a great difference between a right to remove and an obligation to repair.]

Possibly in that case, if the Defendant had thrown down the whole of his wall and let in the sea on his neighbour's land, he might have been liable. But, whatever may be the case as to an artificial barrier, there is no right to remove a natural one to the injury of his neighbour.

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(1) Law Rep. 7 Ex. 305; Ibid. 9 Ex. 64; 2 App. Cas. 781

(2) 2 Q. B. D. 290.

The Defendant denies the title of the Crown to the *U Tower* land, but the Crown is in possession, and it is for him to shew that the land is his. The evidence we have adduced proves the existence of danger and shews that it is caused by the Defendant's acts. The Crown is suing as owner of the land, but still its prerogative rights must not be lost sight of.

[FRY, J.:—I ought to know whether you put your case on prerogative. The Attorney-General did not so open the case.]

We think we have a sufficient case without. But it is not only the interest of the Crown as regards its *jus privatum*, it is its duty as regards its *jus publicum* to protect this land.

[FRY, J.:—In *Hudson* v. *Tabor* (1) it was suggested that the King has a right, as part of his prerogative, to defend the realm against waste by the sea.]

The question of prerogative may arise incidentally in support of our title to the land.

Besides *Fletcher* v. *Smith* (2), there are other authorities in our favour. In *Crompton* v. *Lea* (3) it was held by Vice-Chancellor *Hall* that, though every man has a right to use his property as he pleases, yet if you tap a running stream the matter is entirely different; other riparian proprietors situated on the level have a right to the protection of the river banks. That right was recognised by the House of Lords in *Wilson* v. *Waddell* (4). In *Smith* v. *Kenrick* (5) it was pointed out by Mr. Justice *Maule* (6) that there might be a difficulty if any one removed an ancient sea-wall.

[FRY, J.:—In *Callis* on Sewers (7) it is laid down that there are public rights on the bank of the sea. He speaks of a *necessarium usum* for lading and unlading merchandise, drying nets, &c., and compares the bank to a highway. Is there any other authority on the point?]

Callis has been considered the highest authority. No doubt in *Hudson* v. *Tabor* it was held that he was wrong in saying that a frontager is liable to repair a sea-wall. But in *Dickens* v.

(1) 2 Q. B. D. 290.
(2) 2 App. Cas. 781.
(3) Law Rep. 19 Eq. 115.
(4) 2 App. Cas. 95.
(5) 7 C. B. 515.
(6) Ibid. 558.
(7) Pages 55, 74.

Shaw (1) Mr. Justice *Bayley* said: "In general the Crown has the right" (*i.e.*, to the soil of the sea beach)—"not with a view to the private reservation to collect the stones for itself, or to collect the sand for itself, but for the general interest of the public; and if you can, without interfering with and prejudicing the interest of the public, remove the sand and the stones, the Crown will not interfere. But if you do that which amounts to a nuisance, then you may be indicted for it."

[FRY, J.:—Does that refer to the removal of sand by a private individual?]

Yes. It assumes that the foreshore is vested in the Crown, and Mr. Justice *Bayley* means that it is an indictable offence to damage the sea defences by the removal of the sand. Although the Crown may part with its interest in the soil, it cannot by charter or grant vest in the grantee anything contrary to the public interest. If the Defendant is the owner of the foreshore, he must have derived his title to it from a grant of the Crown, and *Attorney-General* v. *Parmeter* (2) shews that nothing can be done to the public injury. There it was held that "where a part of the sea coast or shore, being the property of the Crown and giving *jus privatum* to the King, is granted to a subject for uses, or to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant is void as to such parts as are open to such objection, if acted upon so as to effect nuisance by working injury to the public right; or it is a grant which does not divest the Crown or invest the grantee."

[FRY, J.:—That is, the Crown can alienate its *jus privatum*, but cannot alienate a right which it holds in trust for the public.]

It is impossible to vest in any person as owner of the foreshore a power of interfering with the public right. The whole history of the Commissions of Sewers, founded, as they were, at common law upon the early prerogative of the Crown, agrees with this view; the Crown could, at common law, enforce a taxation of all persons whose lands were open to the flowing of the sea for the purpose of keeping up the defences. And, if that is so, it is absurd to suppose that any subject, at his own will and pleasure, may take away the natural defences and leave the country exposed to the inroads of the sea. Before *Hudson* v. *Tabor* (1) it seems to have been supposed that frontage owners were bound to maintain the defences against the sea, but it has never yet been suggested that they can remove the natural defences at their own will and pleasure.

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(1) Reported in *Hall* on the Sea-shore, 2nd Ed. App. p. 60.

(2) 10 Price, 378.

Cookson, Q.C., and *Phear*, for the Defendant:—

Nothing is said in the statement of claim about the prerogative of the Crown; the action is not founded on prerogative. It is only said that the Crown is in possession of the *U Tower* land, and the case must be dealt with simply as between a private person who has a posssessory title to the land and the Defendant, who is the owner of the foreshore. And the owner of such a tower, built on a piece of land which has nothing between it and the sea but a shifting shingle bank, is bound to protect it against the inroads of the sea by artificial means. The owner of the foreshore is entitled, in the legitimate use of his property, to sell the shingle for profit and take it away.

[Fry, J.:—Do you say that the owner of the foreshore has a right to cut away the natural defence, and let the water in over the whole country?]

It is a question of degree. The evidence shews that there has been a legitimate use in taking away the shingle for years. If it were possible to destroy the whole natural barrier, that might be a different question. But the present question is whether the taking of shingle from time to time for the purpose of profit, though it may diminish the natural barrier, can be interfered with by the owner of land behind the barrier. It is not true that a mine owner may not use his land so as to damage his neighbour; he may do so provided that he inflicts *damnum* on his neighbour without *injuria*: *Acton* v. *Blundell* (2).

[Fry, J.:—The question is, what are the rights of your neighbour?]

He may take out all the coal which lies under his land, provided that he does so in the legitimate course of mining, even though the result be to drown his neighbour's mine: *Wilson* v. *Waddell* (1). In the same way the Defendant may remove the shingle; it is a legitimate and natural use of his land. *Smith* v. *Kenrick* (2) is to the same effect.

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(1) 2 Q. B. D. 290.

(2) 12 M. & W. 324.

[Fry, J.:—The difficulty is this, what is a natural and what is a non-natural use of your land?]

The tower is not entitled to any support from the Defendant's land: *Angus* v. *Dalton* (3). In *Dickens* v. *Shaw* (4) the foreshore was vested in the Crown, and the question was whether a subject could dig sand or shingle to such an extent as to let in the sea on the land behind. He had no property in the foreshore; he only came there by the leave and license of the Crown. In *Attorney-General* v. *Parmeter* (5) the Crown had made a grant to a private individual, and it was held that the grant did not entitle him to commit a nuisance to the public at large. That has no application to the present case, which is founded merely on the right of private property in the *U Tower* land.

[Fry, J.:—What do you say to the passages in *Callis?*]

He is no doubt a high authority on the question of sewers, but the Court of Appeal, in *Hudson* v. *Tabor* (6), felt no difficulty in overruling him as to the duty of a frontager to maintain a sea-wall for the benefit of neighbouring landowners.

[Fry, J.:—But the Court intimated an opinion that the Crown, by virtue of its prerogative, might have the right to call upon a man to construct a sea-wall. If so, it might equally have the right to prevent him from destroying a natural barrier.]

The case cannot be put upon prerogative, for the pleadings do not raise that, and the Attorney-General did not so open the case. The statute 15 Geo. 2, c. 33, which provides, by sects. 6–9, against the removal of starr or bent from sand-hills adjoining the sea, only provides against its removal without the consent of the lord, and it shews that a statutory power was needed to prevent the removal.

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(1) 2 App. Cas. 95.

(2) 7 C. B. 515.

(3) 4 Q. B. D. 162.

(4) *Hall* on the Sea-shore, 2nd Ed. App. p. 45.

(5) 10 Price, 378.

(6) 2 Q. B. D. 290.

This is a mere *quia timet* action. The Plaintiff's evidence does not shew that any damage has been done to the tower land. The Plaintiff in a *quia timet* action must prove immediate danger, or at any rate reasonable probability of danger: *Haines* v. *Taylor* (1); *Pattisson* v. *Gilford* (2).

The flooding of the land in January, 1877, which has been proved, is fully accounted for by the extraordinary high tide that then occurred, and the Defendant is entitled, even if his acts contributed to the flooding, to have credit for what would have happened by reason of the high tide if he had done nothing: *Nitro-Phosphate Company* v. *London and St. Katharine Docks Company* (3).

The prerogative of the Crown may be exercised for the benefit of the public, but, so far as any cost or prejudice to any person is involved in the exercise of it, that cost or prejudice must be borne rateably by the persons who are to be benefited. The Crown cannot compel an individual to abstain from the profitable enjoyment of his land for the benefit of his neighbours, and receive no compensation from them. It cannot impose a burden on a particular individual for the benefit of others. The Crown is a trustee of public property for the public. In many instances the public may enjoy public property in specie, *e.g.*, the right of navigation on the foreshore between high and low-water mark. It would be a breach of trust for the Crown to make a grant in derogation of such a right. That was the principle of *Dickens* v. *Shaw* (4).

There are other rights which cannot be enjoyed by each individual of the public without destruction of the subject-matter. Such a right is the digging of shingle, and the Crown can grant that to an individual. The right to have a sea-wall maintained for the protection of the land is a private, not a public right. A public right can only be defended by the Attorney-General. The action in *Hudson* v. *Tabor* (5) was brought by an individual; he could not have maintained the action if the right had been a public one.

[FRY, J.:—The question there was whether an individual was

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(1) 2 Ph. 209.

(2) Law Rep. 18 Eq. 259.

(3) 9 Ch. D. 503.

(4) *Hall* on the Sea-shore, 2nd Ed. App. p. 45.

(5) 2 Q. B. D. 290.

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bound to maintain an artificial wall. It is a distinct question whether the public have a right to prevent the destruction of a natural barrier.]

But it shews that as regards a sea-wall only the ordinary common law rights exist as between adjoining owners, and what those rights are is shewn by *Rylands* v. *Fletcher* (1). A man may make a natural use of his property, and the natural use of shingle is to take some of it away. The evidence shews that the Defendant has not done more than that.

Rigby, in reply:—

We have proved actual and immediate danger. *Fletcher* v. *Smith* (2) is conclusive in our favour. *Wilson* v. *Waddell* (3) is not inconsistent with it, nor is *Rylands* v. *Fletcher*. *Fletcher* v. *Smith* shews that if a man interferes with the natural banks of a running stream he is at the very lowest bound to substitute artificial banks as good as those with which he has interfered. Lord *Penzance* put the obligation even higher than that, viz., that though there might be no responsibility for an overflow of the stream from the natural banks, there might be a responsibility for an overflow from the substituted artificial banks. At any rate, it is an indictable offence to injure the natural bank of a navigable river or of the sea. *Callis* on Sewers (4) is an authority for this, though there is no reported case on the point. But it would be a monstrous thing if the owner of a river bank or a sea bank could do just as he liked with it, and set free the water over a whole district. It does not follow that because *Callis* has been overruled on one point his authority is lessened on another point.

[FRY, J.:—The passage you have cited was observed upon by Mr. Justice *Buller* in *Ball* v. *Herbert* (5).]

That was nothing more than a limitation of the generality of the proposition laid down by *Callis*. But the shore of the sea or of the river in the present case is a very different thing from the bank of a navigable river, which was dealt with in *Ball* v. *Herbert*. There is certainly some public right over the shore of the *Deben*;

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(1) Law Rep. 3 H. L. 330.
(2) 2 App. Cas. 781.
(3) 2 App. Cas. 95.
(4) Pages 73, 74.
(5) 3 T. R. 253, 263.

there must be a right to land on the shingle and to pass over it as a highway. That has never been disputed, and that would be enough to support the proposition of *Callis*. In *West Cumberland Iron and Steel Company* v. *Kenyon* (1), the Court of Appeal came to the conclusion that no damage was done to the Plaintiffs, and that therefore the action could not be maintained.

The Court of Appeal did not treat *West Cumberland Iron and Steel Company* v. *Kenyon* as governed by *Smith* v. *Kenrick* (2), though they held that that case is law as to mining property.

[Fry, J.:—The real question is, what is the nature of the obligation the existence of which Lord *Penzance* inferred in his judgment in *Fletcher* v. *Smith* (3)? Is the taking away shingle a natural or a non-natural use of the land?]

A non-natural use.

[Fry, J.:—Why so? According to the recollection of the oldest witnesses who have been before me the thing has gone on for years.]

In the case of mining property each mine-owner uses his land naturally. Here the one owner remains passive, while the other destroys the barrier, and thus brings the foreign substance, the water, into his neighbour's land. The shingle is the natural barrier against the influx of the sea. Natural user is not the same thing as lawful user. The question is whether you are throwing an undue burden on your neighbour.

But we rest our case also on the prerogative of the Crown, as laid down in *Coke, Fitzherbert,* and other books, and recognised in *Hudson* v. *Tabor* (4). It is the prerogative and the duty of the Crown to protect the shores of the realm from the inroads of the sea, and neither the Crown nor a subject is entitled to remove the natural barrier. The Crown cannot do so itself, and cannot grant the right to do so to a subject. The Crown is therefore entitled to an injunction to prevent a subject from removing the natural barrier.

Fry, J.:—

Her Majesty is in possession of a quadrangular piece of land, occupied by a martello tower, near the estuary of the River *Deben*, and the informant and the Secretary of State for the War Department, as Plaintiff, seek an injunction to restrain the Defendant from removing shingle from the natural barrier of shingle, protecting from the sea the piece of land which I have mentioned.

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(1) 11 Ch. D. 782.

(2) 7 C. B. 515.

(3) 2 App. Cas. 781.

(4) 2 Q. B. D. 290.

There are two questions for decision. First: Has the existence of the piece of land of which Her Majesty is so possessed been imperilled by the acts of the Defendant? Secondly: If so, has Her Majesty, or the Secretary of State for War, a right of action against the Defendant in respect of the danger which has so accrued to the land?

The River *Deben* enters the *German Ocean* in a direction nearly from north to south, and along the western shore of the mouth of the estuary there is a bank of shingle, which protects the land lying to the west of it from the operation and action of the sea. That land is a somewhat low tract, protected, as I have already pointed out, on the east by the shore and the bank of shingle. On the west it is protected, apparently, by an earth wall; in like manner, on the north, it is protected by an earth wall, and on the south it is protected by a continuation of the bank of shingle. The piece of land of which Her Majesty is possessed does not run quite parallel with the shore of the river, but inclines somewhat towards the east as it approaches the north, and its north-east corner is the nearest point of the whole to the River *Deben*. For that reason, and also because the sandhills or banks which lie at the back of the shingle are somewhat depressed at the north-eastern corner, that portion of the land is the most of all exposed to the operation of the sea. The surrounding land, including the sea coast and the shingle bank, which I must observe is no part of the sea shore, because it is above the ordinary high-water mark, is in the possession and admitted to be the property of Colonel *Tomline*. From the evidence which has been adduced it appears that the shore along the estuary of the River *Deben* is what has been called an "accumulating beach," that is to say, if left alone, the tendency of the forces of nature is to heap up shingle upon the beach to such an extent that, if a small portion of shingle be taken away, or a hole be made in the shingle bank, there will be a tendency to repair the hole and to restore the bank to its former condition. That general accumulating operation of nature upon the bank is however subject to variations and to actions in the opposite direction. When the wind blows from the north or north-east the tide will often abstract shingle from the bank. On the other hand, when the winds are from the south or south-west the tendency to heap up shingle on the bank is greatly increased. As the result, the shore and the bank itself are liable to certain variations from time to time in accordance with the operations of the wind and the waves. It is quite possible, although this is not strictly in evidence, with regard to this shore, that this piece of land is subject to periodical changes, to periods of increment and decrement with regard to the shingle. That has been shewn to be a common phenomenon with regard to such beaches, but it has not been shewn actually to exist in the present case. It results from what I have said that there is a certain power of restoration and recovery in the beach itself in respect of any wound or injury that may be inflicted on the bank: but at the same time it is the common case of the Plaintiff and the Defendant that it is possible to abstract so much shingle from a given point as to occasion danger to the land behind that point—at any rate temporary danger—that is, danger until the natural forces which are at work shall so far have operated as to heal the wound which has been so caused. It has been said by the witnesses on both sides that the question of danger or no danger to the land behind turns upon the equation between the deposit and the abstraction of shingle from the beach.

I have then to inquire whether there has been inflicted upon this bank of shingle a wound, or injury, or excavation which has caused danger to the land of which Her Majesty is possessed. For many years past, as long as the recollection of the oldest witness goes, it has been the practice of the owners of the shore and of the bank to sell shingle from it, and vessels of increasing magnitude have been in the habit of going on to the shore and there receiving loads of shingle from the bank. It appears that for the last four or five years this process of digging shingle from the bank has been greatly on the increase, and, according to the evidence before me, during the last few years it has been going on at a rate of from 9000 to 11,000 tons per annum. Directing my attention specially to the bank at the north-eastern corner of the enclosure of the martello tower, I am satisfied that some ten years ago the bank of shingle was very much thicker and very much larger than it is now, and that during the year 1876 the operations of digging the shingle were mainly, if not entirely, concentrated upon the land in front of the tower, and that they went on then to a very great extent. In January, 1877, a very high tide occurred, and then for the first time, so far as is known to any of the witnesses who have been before me, water came over part of the shore on to the north-eastern part of the tower land, and there accumulated to a considerable, but not to a dangerous, extent: and a further effect of that high tide was that something like two-thirds of the bank of shingle which had previously existed was taken away. That result, I think, was probably due to the concentrated workings of the shingle which had taken place in the previous summer. From the summer of 1876 down to the month of October, 1877, I have no distinct evidence of what was going on on this part of the shore, but I find that in October, 1877, a vessel called the *Christiana* took in about 100 tons at the north-eastern corner of the tower land, and, including that vessel, I find that from October, 1877, down to June, 1878, very nearly 500 tons of shingle were abstracted from the beach in front of the tower.

On the 25th of June, 1878, I have the result of a survey made for the Crown by Major *Brine*, and at that time I find that the bank had so far receded as to leave the north-eastern corner-stone of the enclosure upon the precise crest of the bank, a position which, as it appears to me, it had not occupied for a very long time before that, and which I conclude resulted from the excavation of the bank to which I have referred. Shortly after that, on the 18th of July, 1878, this action was begun. I have had the history of the relation between the crest of the bank and the corner-stone] carried down, and I find that in December the retrogressive operation had still proceeded, and that the crest had passed within the stone, although no doubt to a very small extent, and that in March of the present year it was nearly, if not exactly, in the same position. It appears to me further that the process of accumulation had meanwhile gone on on the lower part of the bank, where it most naturally and most easily occurs, but that it had not taken place on the upper part of the bank, which, being above the ordinary action of the tide, is only operated upon either by, as has been stated, the pressure below which forces the stones into the bank, and so forces the upper stones to a higher level than they previously occupied, or by the operation of the waves casting stones, as it is known they do, to a distance beyond that to which they themselves reach. In the result I come to the conclusion that the wound which had been inflicted upon the bank in the summer of 1876 had never been healed in March, 1879, but on the contrary, during that interval of time its effect had progressed, and that there was an actual diminution of the land within the enclosure consequent upon the wound inflicted in the summer of 1876.

I hold, therefore, that the informant and Plaintiff have shewn that the removal of the shingle has created danger to the land, and that, if similar acts are committed in time to come, the danger to the land will increase. I further come to the conclusion that this action is not, as has been said, a mere *quia timet* action, but that it is directed against acts which have produced a slight, though ascertainable, injury to the land of Her Majesty: and, inasmuch as the Defendant asserts the right to do in time to come what he has done in time past, the action is one which can be, and must be sustained, if the acts which the Defendant has committed create any right in Her Majesty.

In this case Her Majesty is not suing directly in respect of any prerogative. She is claiming the same relief as one of her subjects might claim, if he were possessed of the piece of land in question. Of course, so far as Her Majesty's prerogative throws any light upon the right of the subject, the prerogative must be considered, but no further.

The case was argued in the first instance almost exclusively upon the authority of *Fletcher* v. *Smith* (1), which, it is said, determines that the acts of the Defendant have created a right in Her Majesty. Before adverting to that case in detail I must refer to two earlier cases. The first is *Smith* v. *Kenrick* (2), which determined that he who abstracts minerals from his own land, and thereby permits water, which did not previously flow underground to his neighbour, thenceforth to flow underground to his neighbour, does no wrong. He may take away the intervening coal without creating any liability on himself, but, if his neighbour desires to protect himself from the water which will so flow upon him, he must do it by his own barrier. The other is *Baird* v. *Williamson* (1), which shews the distinction between permitting water to flow on to your neighbour's land by abstracting your own mineral, and causing water to flow, or raising it from a lower stratum, from which it might have flowed in a different direction, to a higher one, and so making it flow on to your neighbour's land. Whereas the one, the permitting the water to flow, is not actionable, the causing the water to flow by pumping it against the force of gravity is actionable. A very remarkable distinction has therefore been drawn between the two cases. In *Fletcher* v. *Smith* (2) the question arose in this way—there was a watercourse which flowed through the Defendant's land, there were hollows in his land, and into those hollows water came from two sources, from the heavens above and from the diversion of the watercourse. When the case was before the Court of Exchequer Chamber, the Court said that, if the water came into the hollows by reason of the diversion of the stream, then the case was within the doctrine of *Baird* v. *Williamson* with regard to the water pumped up, and they accordingly sent the matter back for further trial.

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(1) 2 App. Cas. 781.

(2) 7 C. B. 515.

Now, if I am to follow *Baird* v. *Williamson*, the question will turn upon this—whether the abstraction of the sea bank in the present case is analogous to the abstraction of the coal in the first instance in *Baird* v. *Williamson*, and, if so, as the mere flowing of the water there by the force of gravity in the mine, so here its flowing by the force of the attraction of the sun or moon, or whatever may be the cause of the tide, will not be actionable. If, on the other hand, it is analogous to the pumping up of water against gravitation, of course it would be actionable. It appears to me, I confess, if the case ought to be determined by the analogy of *Baird* v. *Williamson*, that I should be bound to hold that taking shingle away is analogous to taking coal away, and therefore *Fletcher* v. *Smith* in the Exchequer Chamber in my judgment throws no clear light upon the case. That case, how-

(1) 15 C. B. (N.S.) 376.

(2) 2 App. Cas. 781.

ever, went to the House of Lords, and there Lord *Penzance* said (1), "At the threshold of the inquiry, as to the Defendants' liability to the Plaintiff, lies the question, what obligations did the Defendants incur when they diverted the natural watercourse?" His Lordship assumes that an obligation was created by the diversion of the natural waters, but what the ground of that obligation was, what was its extent, or to what cases it applied, I do not know. That which would be important for me to know was assumed in that case. Of course if the case now before me were like *Fletcher* v. *Smith* (2) in its circumstances, I should know that the principle, whatever it was, must apply; but seeing that it is not, and not knowing the generality of the obligation which was then assumed, I feel that very little light is thrown on the present case by the decision of the House of Lords.

Another principle which governs some cases has been referred to and invoked in this case, that is the distinction between a natural and a non-natural user of land. Whereas a natural user of your land, so as to be an injury to your neighbour, is not actionable, a non-natural user of it creating an injury to your neighbour is actionable. That principle was laid down in *Rylands* v. *Fletcher* (3). Certain cases which have been determined shew that particular instances of user are not cases of natural user of land. For instance, it has been determined, as I take it, in *Baird* v. *Williamson* (4) that pumping up water from a lower stratum so as to let it flow down the channels existing in a higher stratum is not a natural user of your land, and therefore, if you injure your neighbour by it, it is actionable. Again, if in the course of mining operations you make a borehole at the bottom of your mine, not for the legitimate and ordinary purposes of mining, but for the purpose of throwing your water on to your neighbour's land, that is a non-natural user of your land, and is actionable. Again, if you bring water upon land which has previously not been covered by it, and store it up in a reservoir, and do not take sufficient precaution to prevent the water escaping from the reservoir, and it escapes and injures your neighbour's land, that is actionable, because it is a non-natural user of the land. That is *Rylands* v.

(1) 2 App. Cas. 787.

(2) Ibid. 781.

(3) Law Rep. 3 H. L. 330.

(4) 15 C. B. (N.S.) 376.

Fletcher (1). And, lastly, the diverting a stream which flows through your land into hollows, so that it flows into them, and thereby flowing down the hollows injures your neighbour, is a non-natural user of the land, and is actionable. Those cases illustrate, no doubt, what is meant by non-natural user. But when I apply them to the present case, they afford very little light. Is the abstraction of this bank analogous to taking coal? If so, it is a natural user. Is it analogous to diverting a stream actively? If so, it is a non-natural user. I confess it appears to me that, of the two, it is more like the abstraction of the coal, and that, if I had to determine the case upon the distinction between natural and non-natural user, I must have regard to the evidence which has shewn me that, from the memory of the oldest witness down to the present time, this bank has been used for the purpose of supplying shingle to ships, partly for ballast, and partly for the purpose of making cement, and there is no other known use to which the bank can be put, except, of course, that of protecting the land, and therefore the taking away the shingle would be a natural user of the land.

There is one other observation which I desire to make on this part of the case. It is laid down by an American writer of great eminence, Chancellor *Kent*, in his Commentaries (2), that "*Aqua currit, et debet currere ut currere solebat* is the language of the law." If that maxim were supported by any authority, it would no doubt lead to this conclusion, that whoever interferes with the natural flow of any water to the injury of any one would do it at his own risk, and would be liable to an action. I am not aware of any authority of the English law, certainly none has been cited, which shews that I can rely upon that maxim in its generality. If the matter therefore rested simply upon analogy to the cases I have referred to, I should feel that it was one of great difficulty.

But it appears to me that there is a further matter to be considered which does throw great light upon the case. There is, in my judgment, a prerogative and a duty in the Crown which is inconsistent with the alleged right of the Defendant, and imports such a right in a private person as the Crown now insists upon, that prerogative and duty being the obligation, and with it the

(1) Law Rep. 3 H. L. 330.

(2) 12th Ed. vol, iii. p. 439.

right, to protect the land from the inundation of the water, for the benefit, not of one person in particular, but of the whole commonwealth, which is interested in the protection and preservation of the land, alike from foreign enemies and from the water which surrounds our island.

The statute 6 Hen. 6, c. 5, which is the earliest statute relating to commissioners of sewers, contains the form of commission to be issued, and that contains this passage: "*Nos pro eo quod ratione dignitatis nostre regie ad providendum salvationi regni nostri Anglie circumquaque sumus astricti,*" a distinct assertion, therefore, of the obligation of the Crown to protect the kingdom of *England* on every side from the inundation of the water, because that is the preamble which leads to the directing of a commission to certain persons to protect particular portions of lands from the access of water. A similar form of commission is given in the more recent statute 23 Hen. 8, c. 5. There the recital is, "For that by reason of our dignity and prerogative royal we be bound to provide for the safety and preservation of our realm of *England,* willing that speedy remedy be had in the premises, have assigned you," and so on, to consider the condition of the sea-walls of the districts in question. The same form is to be found in *Fitzherbert* (1), and that writer makes upon it this observation: "It is intended that the King of right ought to keep and defend his kingdom, as well against the sea as against enemies, that it be not drowned or wasted, and to provide remedy for the same." In *Coke's* Reports (2) there occurs the case of the *Isle of Ely.* There it is said: "It is to be known that by the common law, before the statute of 6 Hen. 6, c. 5, the King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted, and also to provide that his subjects have their passage through the realm by bridges and highways in safety, and therefore, if the sea-walls be broken, or the sewers or gutters are not scoured, that the fresh waters cannot have their direct course, the King ought to grant a commission to inquire, and to hear and determine these defaults." The same doctrine was recognised in *Henly* v. *Mayor of Lyme* (3), where Chief Justice *Best* said (4): "The King by his prerogative, as will be found

(1) Nat. Brev. 113.

(2) 10 Rep. 141, a.

(3) 5 Bing. 91.

(4) Ibid. 109.

in every book on the prerogative of the Crown, is bound to take care to guard and to protect the shores and lands adjoining the sea from being overflowed by the sea; he is to discharge that duty, as it was discharged before the statute of Hen. 8, by issuing commissions and making ordinances which we find he certainly was in the habit of making before the statute of Hen. 8." Lastly, in *Hudson* v. *Tabor* (1), when before the Court of Appeal the existence of the prerogative was referred to, the Court said (2): "The King has probably, from the very earliest times, had a right, as part of the prerogative, to defend the realm against waste of the sea, and to order the construction of defences at the expense generally of those who are to be benefited by them. The various statutes of sewers, beginning with the statute of 6 Hen. 6, c. 5, do but regulate the exercise of the prerogative in this respect, and prescribe the forms of commissions for the ordering and execution of the necessary works, which forms have from time to time been varied."

I come, therefore, to the conclusion, that there exists in the Crown this prerogative right and duty, a duty of course to its subjects of which the law must take cognizance, although the law does not enforce the performance. And, if this prerogative and right exist in the Crown, it seems to me impossible to suppose that the subject can have a right to do that which the Defendant claims to do. It would be absurd that the subject should be at liberty to destroy that which the Crown is bound to protect.

There are, I should observe, traces in the earlier books of some public right in the banks of the sea. Lord *Hale* (3) quotes from *Bracton* a passage in which he lays down such a doctrine: "*Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis.*" It is quite true that that passage has been commented upon, and certainly disapproved of as expressing the existing law with regard to rivers, in *Ball* v. *Herbert* (4). There, Lord *Kenyon*, in delivering judgment, made this observation: "Some of the passages in Lord *Hale*, which seem to favour the common law right, are rather applicable to the banks of the sea and to ports:" rather he meant to the banks of the sea than to the banks of a river, to which the case then before him related. *Callis,* in the passage which has been quoted more than once in the course of this discussion, asserts that the public have a *necessarium usum* on the banks of rivers and the sea. I do not rely upon either of those authorities as being conclusive with regard to the rights of the public; but they seem to me not unimportant as shewing that our earlier writers considered that the bank of the sea was not absolutely private property; free from all public use, in the same way as other private land might be.

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(1) 2 Q. B. D. 290.

(2) Ibid. 294.

(3) De Portibus Maris, cap. vii. Harg. Tract. vol. i. p. 83.

(4) 3 T. R. 253.

It remains for me to observe, that there is no conflict whatever between the conclusion at which I have arrived, and the decision in *Hudson* v. *Tabor* (1). It may well be that there is the greatest distinction between the liability to repair an artificial bank, and the right to destroy a natural protection, and I find nothing in the judgment in that case which bears upon or conflicts with the conclusion at which I arrive.

I hold, therefore, that there is in the Crown the prerogative and the duty to which I have referred, and a right in every one of Her Majesty's subjects to have that duty performed (though of course the duty is not one which the Courts can enforce), and consequently there is an obligation on every person possessed of a sea bank to do nothing inconsistent with the protection of the land of this country from the inroads of the sea. That right, it appears to me, the Defendant has violated, and, as the result, I must grant the injunction which is prayed.

The question, however, which I have determined appears to me to be one of unusual difficulty, and I have arrived at the conclusion which I have expressed after considerable hesitation and doubt.

The injunction will be to restrain the Defendant, his agents, &c., from so digging or removing or authorizing to be dug or removed any shingle from the natural barrier of shingle protecting from the sea the land forming the site of and the enclosure surrounding the *U Tower,* as to endanger that land or expose it to the inroads of the sea. The Defendant must pay the costs of the action.

Solicitor for Informant and Plaintiff: *W. Tindal Perkins.*

Solicitor for Defendant: *W. F. Stokes.*

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(1) 2 Q. B. D. 290.

FRY, J.

1879

June 10.

POWELL *v.* WILLIAMS.

[1878 P. 147.]

Practice—Trial by Jury—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26.

13 Ch D 771
20 Ch D 368

Upon motion by the Defendant under Rules of Court, 1875, Order XXXVI., rule 3, that certain specified issues of fact might be tried before a Judge ~~or~~ jury in the country:—

Held, that it was obligatory on the Court to order the trial subject to the discretion given by rule 26; and it not appearing to the Court desirable to direct a trial without a jury, the motion was acceded to, the issues to be settled in Chambers:—

Held, also, that the Defendant should have given notice out of Court without moving for an order; and should have required the issues of fact to be tried without specifying any particular issues; and in consequence of these irregularities, no costs were allowed to the Defendant.

THIS action was brought by *George Powell*, who resided in a house built eight years ago at *Glastyn*, near *Rhayader*, in the county of *Radnor*. About 400 yards from the Plaintiff's house there was a stone quarry which was used by persons in the neighbourhood for getting stone, and occasionally the stone was blasted by means of gunpowder. This, however, occurred only three or four times a year, and the effect, which was not more than the discharge of a fowling-piece, produced no annoyance to the Plaintiff. The quarry had lately come into the possession of the Defendant, who had commenced blasting the stone by means of dynamite, and the explosions took place daily. The quarry was situate in the face of a rock rising 200 feet above *Glastyn*, and in front of the Plaintiff's house, and the continual explosions by dynamite had been the cause of great annoyance to the Plaintiff and his family. On some occasions the explosions had produced perceptible vibrations in the house, and the clocks had been several times stopped.

The Plaintiff claimed an injunction to restrain the Defendant from carrying on the blasting of the rock on any works at his quarry, so as to cause nuisance or annoyance to the Plaintiff or his family by the noise and concussion thereby occasioned or otherwise at the Plaintiff's residence, or so as to cause danger or inconvenience to the Plaintiff or his family or friends going to or from his residence by the highroad.

Plaintiff gave notice of trial without a jury.

A motion in due time was now made on behalf of the Defendant under the Rules of Court, 1875, Order XXXVI., rule 3, that the following issues of fact might be tried before a Judge and jury at *Presteign*, in the county of *Radnor*, namely: 1. Whether the Defendant had carried on his works at his quarry in such a manner as to occasion a nuisance to the Plaintiff. 2. Whether the nuisance, if any, existed in the same degree twenty years ago, or had been materially increased during the last twenty years. 3. What, if any, damage had been occasioned to the Plaintiff by the nuisance complained of.

The Plaintiff's solicitor in answer to the motion alleged that many of the witnesses who would be called resided out of the county of *Radnor*, and that it would be necessary to examine scientific witnesses residing in *London*; that under these circumstances it would be cheaper and more convenient to have the trial in *London* than at *Presteign*; but if the Court should think it desirable that the trial should take place in the country, then the town of *Hereford* would be more convenient than *Presteign*, as being more accessible for all parties.

Higgins, Q.C., and *Chapman Barber*, in support of the motion :—

Under Order XXXVI., rule 3, the Defendant has a right, upon giving notice within the four days prescribed, to have the issues of fact in the case tried by a jury, unless there shall be any substantial ground upon which the Court may think it undesirable; and the Court will not in the absence of special cause deprive a Defendant of his statutory right under the Orders. This was laid down in *Clarke* v. *Cookson* (1), where Vice-Chancellor *Hall* said that the Defendant's right should not ordinarily be interfered with by the exercise of the discretion given to the Court by rule 26.

The same principle was laid down in *West* v. *White* (2), and in *Bordier* v. *Burrell* (3) the Master of the Rolls followed those decisions. In *Wood and Ivery, Limited* v. *Hamblett* (1) a case of the same nature was ordered to be tried in the country because there were a great many local witnesses, and it was therefore cheaper and more convenient than having the trial in *London.*

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(1) 2 Ch. D. 746.

(2) 4 Ch. D. 631.

(3) 5 Ch. D. 512.

In *Ruston* v. *Tobin* (2) Vice-Chancellor *Malins* refused to allow a trial by jury upon the application of the Defendant, but that was on the ground that the action, which was to set aside an agreement, was a case coming specially within the province of the Court of Chancery, and that decision was affirmed by the Court of Appeal, where the Court refused to interfere with the discretion of the Judge, but said that they should have decided as the Vice-Chancellor had done. All the witnesses in this case are resident in the neighbourhood, and, the case being one for damages in respect of a nuisance, the issues of fact should be tried on the spot.

Glasse, Q.C., and *Cracknall*, for the Plaintiff:—

Our first objection is as to the form in which this application is made. The 3rd rule of Order XXXVI. directs that the Defendant may, upon giving notice within four days that he desires to have the issues of fact tried before a Judge and jury, be entitled to have the same so tried. In this case no notice was given, but the motion is brought on without such notice. Then again the motion is that certain questions of fact in the action may be tried, and we object to the issues set forth, because we say these issues will not try the real questions at issue. Then upon the merits we say that the town of *Presteign*, where the Defendant wishes the trial to take place, is most inconvenient and inaccessible, and it would be as easy and as cheap to bring the witnesses to *London;* besides which there must be scientific evidence produced by persons resident in *London*, and it would be much more expensive to take them down to the country. No doubt the town of *Hereford* would be easier of access than *Presteign*, but not more so than *London.* In the case of *Spratt's Patent* v. *Ward & Co.* (3) it was held that the Defendant was not entitled as of right under Order XXXVI., rule 3, to have the action tried before a Judge and jury, and the Court would

(1) 6 Ch. D. 113.

(2) 10 Ch. D. 558.

(3) 11 Ch. D. 240.

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not grant the application where the issues of fact were of minor importance as compared with the main questions in dispute. Here we say that there is no real defence as to the nuisance, but the question is one of scientific evidence as to the effect of dynamite as compared with gunpowder as a blasting material. In *Mirehouse* v. *Barnett* (1) a trial by jury was refused because one of the Defendants did not concur in the application, and because the case could be more conveniently tried in the Chancery Division, it being entirely within the discretion of the Judge to accede or not to the motion.

FRY, J.:—

I think the proper order to make in this case will be to refer it to Chambers to settle proper issues of fact in this action, and to direct those issues of fact to be tried before a Judge and jury at the assizes at *Hereford*.

The application now made is by the Defendant; Order XXXVI., rule 3, having provided that the Plaintiff may give notice of the trial of an action, and specify the mode of trial of what he desires to be tried, provides that "the Defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow, to the effect that he desires to have the issues of fact tried before a Judge and jury, be entitled to have the same so tried."

The words, no doubt, are permissive. The Defendant may, upon giving notice, be entitled to have the issues tried; but it appears to me that they are obligatory on the Court, subject only to the discretion given by rule 26: "The Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could without any consent of parties be tried without a jury."

No doubt the question of fact in this action could before the passing of the Act have been without the consent of parties tried without a jury in the Court of Chancery; and, therefore, if I saw that there were grounds on which it appeared to me to be desirable

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(1) 26 W. R. 690. W N (1878) 110 MR.

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that the trial should not take place before a jury, I could so direct. But having attended to what has been stated to me in this matter, and the previous decisions of other Judges, I do not find anything which makes it desirable that the trial should be without a jury. I think, therefore, the Defendant is entitled under Order XXXVI., rule 3, to have the issues of fact tried before a Judge and jury, and I therefore direct them to be so tried.

Then this objection has been urged. It has been said that the Defendant has not been correct in point of form, because although he, within the time extended for giving notice, has given his notice of motion, he did not give simple notice out of Court to the Plaintiff, and again, that instead of requiring generally that the issues of fact in the action should be tried before a Judge and jury, he has required that specific issues shall be so tried. I think that the notice of motion is an expression of a desire on the part of the Defendant that particular issues should be tried; and, therefore, although I do not think that it is the proper or necessary form of giving notice as required by rule 3, I think it satisfies the requirements of that rule, and goes beyond it.

In the next place, it seems to me that the Defendant has been in error as to the issues of fact which he has required to be tried, because it has been very properly admitted that those specified in the notice of motion are not the proper or best issues of fact to be tried; and in the next place, I think that what the Defendant ought to have required is, generally, that issues of fact should be tried. Upon those points of form, it appears to me that the Defendant has been wrong. Therefore, although I make this order, I shall make it without giving the Defendant any costs of this motion.

I do not give the Plaintiff any costs of the motion, because he has resisted it *in toto*. If it had been met by a consent on the Plaintiff's part to give the Defendant that which he is strictly entitled to, I should have given the Plaintiff the costs of this motion. The Plaintiff not having done that, I simply make the order without costs on either side.

Higgins, Q.C.:—The reasons ought to appear on the face of the order.

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FRY, J.:—Quite so. The reasons will be, in the first place, that the *locus in quo* is more accessible from *Hereford* than from *London;* that a large number of witnesses reside in places from which *Hereford* is more accessible than *London;* and that it has not been made to appear to the Court desirable to direct a trial without a jury of the issues of fact.

Solicitors for Plaintiff: *Watkins, Baker, & Co.*
Solicitors for Defendant: *Meredith, Roberts, & Mills.*

In re ALBION ASSURANCE SOCIETY.

WINSTONE'S CASE.

FRY, J.
1879
June 10, 11, 12.

[illegible]

Assurance Company—Mutual Principle—Shareholders and Assurance Members—Policy-holder with Profits—Contributory—Companies Act, 1862, *s.* 23.

An unlimited assurance company was formed upon the mutual principle for granting assurances upon lives with or without participation in profits with a capital stated by the memorandum of association to be divided between shareholders. The articles of association provided that the company should at first consist of two classes of members, namely, shareholders, so long as there should be any shareholders, and assurance members, defined to mean policy-holders with participation in profits and registered as members of the company; and when the shareholders should be paid off under the scheme provided for, then the company was to consist of assurance members only, who were entitled to equal powers of electing and of becoming directors; but no person to be entitled to be registered in respect of any policy until he should have signed an agreement to become a member. The payment of a premium was to entitle a policy-holder, if registered, to be a member.

Miss *W.* signed a proposal in May, 1873, for a policy with profits, which was to be the basis of the policy, and thereby she agreed to execute the articles of association when required. The policy recited the proposal, and that Miss *W.* had agreed to become a member upon the basis of that contract, and that the policy was to be subject to the articles of association. Premiums were regularly paid till the company was wound up in 1878, but Miss *W.*'s name was not entered on the register:—

Held, that by the terms of the proposal which engrafted the articles of association, and by signing the policy, and by the payment of premiums, Miss *W.* had acceded to the articles and had agreed to become an assurance member of the company; and that the Court had power to rectify the omission upon the register of the company, and to place her name thereon and on the list of contributories:

Held, also, that there was nothing in the *Companies Act*, 1862, or in the memorandum of association, which precluded the introduction by the articles of two classes of members, viz., shareholders, and assurance members not holding shares.

15 Ch D 502
16 Ch D 85. 88
8 Ch D 642
20 Ch D 463 466.

THIS was an adjourned summons, in which the official liquidator of the *Albion Life Assurance Society* applied for leave to place upon the list of contributories the policy-holders in the society, and to rectify the register of members of the company by including therein the assurance members whose names had not been registered in accordance with the articles of association. An objection was raised on behalf of Miss *Susannah Mary Winstone*, who was a policy-holder for £1000 with profits.

The *Albion Life Assurance Society* was incorporated on the 18th of November, 1863, as an unlimited company, and was subsequently registered under the *Companies Act* of 1862. The capital of the company was stated to be £50,000, divided into 5000 shares of £10 each.

A proposal for a life insurance of £1000 with profits was signed and sent to the office of the society by Miss *Winstone* on the 17th of May, 1873, which contained answers upon a printed form to various inquiries as to the age, state of health, and habits of the person proposing; and it contained the following printed paragraph: "And I further agree to execute the articles of association, or any deed of covenant in conformity thereto, when required." This life proposal was indorsed, "The *Albion Life Assurance Society* on the Mutual Principle."

The policy, which was delivered to Miss *Winstone* and was signed by her, contained a recital that she had signed a proposal, dated the 17th of May, 1873, to become a member of and to effect an insurance with the society in the sum of £1000 upon her life, and had delivered to the society a declaration in writing and signed by her, touching her age, health, and other circumstances and habits of life, and that it had been agreed that such proposal and declaration should form the basis of the contract between the said assured and the society. And, further, that the society had agreed to effect the said proposed assurance (subject to such

But see as to liability in mutual societies Re Great Britain Life Assurance Socy [illegible] proposal and declaration, and to the stipulations and conditions thereinafter contained and referred to) at the premium of £36, payable as therein mentioned. And in the witnessing part of the policy was contained the following statement: "But no member, director, or shareholder of or in the said society, nor his or her executors or administrators, shall be in anywise individually or personally liable, or subject to any claim or demand whatsoever, by virtue or in respect of this policy: Provided nevertheless that this policy and the assurance hereby made shall be subject and liable to the several terms, conditions, and regulations printed and written on the back hereof, and to the said articles of association, rules, and regulations of the said society, so far as the same can be applicable, in the same manner as if the same were respectively repeated and incorporated in this policy."

Miss *Winstone* had paid the premiums upon this policy down to the winding-up of the company, which took place on the 1st of March, 1878.

The objects for which the company was established, as set forth in the memorandum of association, were, "The granting assurances on a single life or joint lives, and on survivorship or for limited terms or contingently determinable, and either with or without participation in the profits of the company; the purchase and sale of annuities, and the granting of endowments and other periodical payments; The advance of moneys on personal securities or contracts, whether further secured by assurance effected with the company or not, and on such terms as the directors shall think fit, and all other business whatsoever usually effected by companies or societies of the like nature, and the doing of all such matters and things as are or may appear to the company to be incident or conducive to the objects aforesaid or any of them, and also such additional or attendant objects as the company may, from time to time, by a resolution passed by a majority of not less than two-thirds of such members of the company for the time being entitled to vote as may be present, in person or by proxy at an extraordinary general meeting of the company to be called for that purpose, determine and resolve upon." By the 4th clause the liability of the members was unlimited, and by the 5th the capital of the company was to be £50,000 divided into 5000 shares of £10 each.

The articles of association were to the following effect:—The term "assurance member" was defined as meaning "every person for the time being holding a subsisting policy of assurance with the company for the whole term of life on the terms of participating in the profits of the company and duly registered as a member of the company." "Shareholder" was defined as meaning "every person who is duly registered as a holder of a share or shares in the subscription capital;" and "subscription capital" was defined as meaning "the temporary subscription capital actually paid up by the shareholder."

By the 2nd clause the company was to consist of two classes of members, namely, the shareholders and assurance members for the time being, so long as there should be any shareholders, and afterwards of the assurance members for the time being only, and the directors should cause a register of the members of the company (both shareholders and assurance members) to be kept in one or more books in accordance with the *Companies Act*, 1862, s. 25.

The subscription capital was to be the sum of £50,000, subject to be increased as thereinafter mentioned, and to be divisible into £5000 shares of £10 each, subject to be paid off as thereinafter provided, and in the meantime to be deemed a "guarantee fund" over and above the accumulation from or in respect of profits, and the amount of all the subscription capital from time to time actually paid up was to be carried to a distinct account and be called the "guarantee fund."

The general funds of the company other than the "subscription capital" was to be called the "assurance fund," and was to consist of all premiums, fines, and other moneys to be received by the company in respect of policies of assurance, annuities, or endowments originally granted or undertaken by the company; and the assurance fund was to be the fund applicable for the payment of interest on the shares in the subscription capital and of such other engagements and liabilities of the company as the directors should from time to time think fit to pay thereout.

The directors were to declare the amount which might be safely dealt with as net profits of the "assurance fund."

The 13th clause provided that the amount of net profits so declared should be appropriated as follows, viz., one-fourth part thereof among the shareholders (if any), and the three-fourth parts,

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or the whole (if the subscription capital should have been paid off) by way of bonus among the holders of such policies issued or undertaken by the company on the terms of participating in profits as should be subsisting at the period fixed for each periodical account, and on which at least five years' premiums should be paid in full.

The 14th and 15th provided for the payment off of the subscription capital whenever the net profits standing to the credit of the assurance fund should be equal to double the amount of the bonuses which would be payable to the shareholders, and in case the subscription capital should be so paid off, then the guarantee fund was to be discontinued and the shareholders to be discharged from all further obligations and liabilities in respect of their shares, and the balance then standing to the credit of the assurance fund should thenceforth be the only fund for receiving and paying all moneys in respect of the transactions of the company.

The 76th clause gave a certain number of votes at all general meetings of the company to both shareholders and policy-holders, to be exercised by them according to the amount of their interest in the company. The 80th provided that whenever the same person should be a shareholder and assurance member, then he should be entitled to vote in right of his qualification in each capacity; and by the 91st it was provided that assurance members for policies of £1000 should be qualified to act as directors. It was further provided that every policy was to contain a proviso that it should take effect and be satisfied only out of the funds and property of the company, and expressly negativing any personal liability on the part of the shareholders or other members; and that no person should be entitled to be registered as a member of the company in respect of any policy until he should, if required by the directors so to do, have signed an agreement to become a member of the company. The payment of a premium on a policy which would entitle the holder, if registered, to be an assurance member, was to be deemed to be an agreement to become a member in respect thereof.

Glasse, Q.C., and ~~*Romer*~~, for the official liquidator:—

We submit that Miss *Winstone* is liable as a contributory in the winding-up of this company. By the *Companies Act*, 1862, s. 38, every member in the event of a winding-up is made liable to contribute. We say that Miss *Winstone* is a member. The 23rd section of the Act defines a member to be every person who has subscribed the memorandum of association, and every other person who has agreed to become a member and whose name is entered on the register. Now it is clear that Miss *Winstone* agreed when she signed the proposal for a policy to become a member and to execute the articles of association. The granting of a policy was made subject to the articles, and by those articles it is provided that payment of premiums shall be deemed to be an agreement to become a member. The articles point out two classes of members—the shareholders and the assurance members. They are both equally members. The company was founded upon the mutual principle, and it was the intention that all members should be liable, so much so that after a time the shareholders were to be paid off and to cease to exist, and the capital of the company was to consist of the fund formed by the assurance members themselves, and they were to vote in the election of directors and to take part in the administration of the affairs of the company, and were qualified to be directors if holders of policies for £1000. Then as to the name not having been entered on the register, that defect can be remedied by the Court, which has power, under the 35th section, to rectify the register by the insertion of the name. This question arose in *Portal* v. *Emmens* (1), where it was held that persons who were not entered in the register were nevertheless liable as shareholders.

Higgins, Q.C., and *W. H. Green*, for shareholders, supported the same view.

Fischer, Q.C., and *Hadley*, for Miss *Winstone*:—

We say that Miss *Winstone*, being only a policy-holder, cannot be placed upon the list of contributories. By the memorandum of association it is provided that the capital of the company is to be £50,000 divided into 5000 shares of £10 each. These are the shareholders, and they are the only members of the company who can be liable. The memorandum of association is the foundation of the company, and cannot be changed by anything which may be introduced into the articles; any provision in the articles which is inconsistent with the memorandum is absolutely void. This was distinctly laid down in *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), where it was held that the memorandum could not be altered, though the alteration might be assented to by a majority of the shareholders, as it was the charter by which the minority were protected against the majority. This rule was not varied by *Duke's Case* (2), in which the 12th section of the Act of 1862 was not referred to by the Master of the Rolls. That section precludes any such alteration as that which has been effected by these articles. The Act only contemplates a company which has its capital divided into shares, and not a mixed company like this. The true construction of this memorandum has reference only to a society constituted of shareholders. This is called a society on mutual principle, but no one could say that this meant mutual insurance; besides, the first premium was paid before the policy was given out. Then, again, the articles specifically provide that the members shall be entered upon the register, but none of the policy-holders were ever registered, nor were they ever called upon to execute the articles of association. Where there has been no registry by the company the Court cannot, under the power of rectifying the register, insert names upon the register. In *Sichell's Case* (3) it was held that the Court had no power to rectify the register on the application of the official liquidator, whatever right there might be upon an application by a shareholder. The names of the policy-holders never having been put forward upon the register precludes the creditors from having any interest in the question and from having any equity to require the insertion of their names. Until we are on the register we cannot be made liable as contributories.

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(1) 1 C. P. D. 664.

Fry, J.:—

The question I have to decide is, whether Miss *Winstone* is or is not a contributory of the *Albion Life Assurance Society*, which is being wound up. The 38th section of the Act of 1862 provides

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(1) Law Rep. 7 H. L. 653.
(2) 1 Ch. D. 620.
(3) Law Rep. 3 Ch. 119, 122.

"that in the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of various enumerated liabilities." The first is "the ordinary debts and liabilities of the company;" the second is "the costs, charges, and expenses of the winding-up;" and the third is "such sums as may be required for the adjustment of the rights of the contributories amongst themselves." If Miss *Winstone* be liable to contribute to any one of those three matters, and is a member of the company, then she will be a contributory.

The question, therefore, is simply whether she is or is not a member of the company. Now, to answer that question I must go back to the 23rd section of the Act, which contains a definition, for the purposes of the Act, of members of the company; and it provides that the subscribers of the memorandum of association of the company, and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company. Miss *Winstone* did not subscribe the memorandum of association, and therefore I have to ask myself other questions with regard to her—first, has she agreed to become a member of the company, and, secondly, is her name entered on the register of members?

Now, has she agreed to become a member of the company? That is a question of fact. What she has done is this: She on the 17th of May, 1873, signed and sent to the company a paper which is called a life proposal, and which is indorsed outside, "The *Albion Life Assurance Society* on the Mutual Principle." By that proposal she stated certain particulars with regard to her life which were important with a view to the policy intended to be issued. She applied for a policy of £1000 with profits, and she signed a declaration with regard to the truth of the preceding particulars; it winds up in these words: "I further agree to execute the articles of association or any deed of covenant in conformity hereto when required." It is, in my judgment, impossible to consider that to be anything else than an accession on the part of Miss *Winstone* to the articles of association of the company.

Her proposal was accepted by the society; and accordingly a policy was issued to her, which bears the date of the 11th of June, 1873, which describes the society as being on the mutual principle, and which commences with this recital, "Whereas *Susannah Mary Winstone* (hereinafter called the assured) has signed a proposal dated the 17th of May, 1873, to become a member of and to effect an assurance with the above-named society in the sum of £1000 upon the life of herself for the term of such life, and has delivered to the said society a declaration in writing dated the 20th of May, 1873, and signed by the assured, touching the age, health, and other circumstances and habits of life of the assured, and it has been agreed that such proposal and declaration shall form the basis of the contract between the said assured and the said society." The policy then continues: "And whereas the society has agreed to take the proposed assurance subject to the proposal and declaration and to the stipulations and conditions" hereinafter contained and referred to at the premium of £36 yearly, payable on the 7th of June, and has received from the said assured the sum of £36 as the premium for such assurance up to the 7th day of June, 1874, inclusive.

Then the operative part of the policy is, "that if the assured shall die" in the usual manner expressed in such documents, "then the subscription capital, guaranteed assurance funds, and other property of the said society shall after proof of the death of the said assured be subject and liable according to the provisions of the articles of association, rules and regulations of the society to pay and subject to the conditions on the back hereof at the chief office of the society, to the executors, administrators, or assigns of the said assured within three calendar months after evidence of death, the sum of £1000, and such further sum or sums (if any) as shall in pursuance of the said articles of association, rules and regulations, be appropriated by way of bonus or addition to this policy. But no member, director, or shareholder of or in the said society shall be in anywise individually or personally liable or subject to any claim or demand whatsoever by virtue or in respect of this policy." Then comes this very important proviso: "That this policy and the assurance hereby made shall be subject and liable to the several terms, conditions, and regulations printed and written on the back hereof, and to the said articles of association, rules and regulations of the said society so far as the same can be applicable, and in the same manner as if the same were respectively repeated and incorporated in this policy." Upon that policy Miss *Winstone* has acted in this sense, that she has from the time of its grant down to the winding-up of the company paid the premiums upon the policy. That document, acted upon in that way by her, appears to me to be a second accession by her to the articles of association of the company. It therefore becomes necessary to consider what those articles are. Now, in the first clause they define assurance members to mean every person for the time being holding a policy of assurance with the company for the whole term of life on the terms of participating in the profits of the company and duly registered as a member of the company. It then defines "shareholder" in the ordinary way, as being every person who holds shares. And the second article is, "That the company shall consist of two classes of members, namely, the shareholders and assurance members for the time being so long as there shall be any shareholders, and afterwards of the assurance members for the time being only; and the directors shall cause a register of the members of the company, both shareholders and assurance members, to be kept in one or more books in accordance with the 26th section of the *Companies Act*, 1862, and the other requirements of the statutes." Nothing can be plainer, therefore, than the intention that every person holding a policy such as that held by Miss *Winstone* shall be a member of the company.

Then the 13th article provides for the division of the profits of the company in this manner, that one-fourth is to go to the shareholders, and three-fourths are to be divided by way of bonus, giving the policy-holder the right to participate in the profits. And the 76th article gives votes to shareholders and to assurance members. The 80th provides for the case of an assurance member being also a shareholder; and the 153rd article provides that the payment of a premium upon the policy which would entitle the holder if registered to be an assurance member shall be deemed to be an agreement to become a member in respect thereof.

Now, looking at those articles of association, and having come to the conclusion I have already expressed, that Miss *Winstone* had acceded to them, it appears to me impossible to contend that she had not agreed to become an assurance member of the company, and that that proposal on her part had not been accepted by the company. I hold, therefore, that she had agreed to become a member of the company.

The next question arises upon the last words of the 23rd section, namely, those which require that the person who is to be a member shall be one whose name is entered on the register of members. It is admitted that Miss *Winstone's* name was not on the register of members, and if matters rested there, of course the definition would not be satisfied; but the 35th section of the Act gives a power to rectify the register. The 98th section provides, "That as soon as may be after making an order for winding up the company, the Court shall settle a list of contributories —which is the very operation I am now concerned in—with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act." Now I understand that to refer to the 35th section, and the 35th section requires the rectification of the register where the name of any person is without sufficient cause entered on or omitted from the register of members of any company under this Act. It appears to me that in this case, if the name, as I understood was the case, had been omitted from the register, it has been omitted without sufficient cause; and therefore I think it is my duty to direct that the register be rectified if it be necessary.

It has been argued before me that this is not a case in which the Court ought to or can rectify the register. It is said it is immaterial to the creditors whether the register be rectified or not. I confess I have listened to that argument with some surprise. The authority cited in support of it was *Sichell's Case* (1), where the official liquidator of the company *mero motu* applied to substitute *A.* for *B.*, it not being shewn whether *A.* or *B.* was the better contributory; but that it is immaterial to the creditors whether a contributory is put on, or nobody is put on in place of that contributory, seems to me rather a remarkable proposition.

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(1) Law Rep. 3 Ch. 119.

The argument has further been supported by the observation that Miss *Winstone's* name has not been returned to the Registrar of Joint Stock Companies. That may well be; yet if the creditors of the company are entitled to the contribution of the contributory, it cannot be immaterial to them that her name should be left out entirely.

It is then said that the policy-holders may have no right against other policy-holders. That may or may not be the case; that is a point which I cannot now determine. I have already pointed out that the 35th section requires me to enter Miss *Winstone* as a contributory, if she be liable in respect of any one of the three classes of liabilities to which I have referred. I think, therefore, that this lady in terms satisfies all the definitions of a member contained in the 23rd section of the Act.

But then two arguments have been addressed to me—one based upon the memorandum of association, and the other upon the structure of the Act of 1862. The first of those arguments is this. It is said that the articles of association cannot modify or vary the conditions of the memorandum of association, and it is said that the memorandum of association in this case provides in effect that the shareholders, and shareholders only, shall be members of the present company. Now, in the first place, in my judgment, the memorandum of association does not do that. The 4th section of the memorandum says that the liabilities of the members are unlimited. The 5th section provides that the capital of the company is to be £50,000, divided into 5000 shares of £10 each, and is totally silent as to who the members are to be. It is said that you may infer that the members are to be shareholders only. Why, I do not know. There is the silence of the memorandum, and the fact that it is possible that other persons than shareholders may contrive to become members of the society. It appears to me that observation is somewhat corroborated by this fact, that the 3rd section of the memorandum of association, which defines the objects of the company, mentions as one of these objects the granting of assurances with participation in the profits of the company. It might well be that the participating policy-holder might be intended to be a member, as was in fact the case in this instance.

One further observation remains to be made on the argument. The argument has assumed that everything which is in the memorandum of association is immutable. I am not convinced that that is the case where, as in this instance, the memorandum of association embodies particulars not required by the statute. In the case of an unlimited company, such as this is, the statute does not require the amount of capital or the definition of membership to be expressed in the memorandum; and if the memorandum is framed so as to introduce into it particulars not required by the statute, I am not convinced that those particulars are immutable. I may add that the observation of the Master of the Rolls in *Duke's Case* (1) expresses exactly the same view.

For these reasons, therefore, I think the argument which is based upon the memorandum of association and the alleged inconsistency between it and the articles of association fails.

The next argument is this. It is said that the Act of 1862, although it defines a member in the manner I have pointed out, contains other sections which impose a third condition or predicate upon members of an unlimited company where there is a share capital, viz., that the member has agreed to become such in the character of a shareholder. It is said that the Act contemplates a primary division of the companies into those which have and those which have not share capital, and that as the result of that it excludes the possibility of a company existing where there is both a share capital and members who are members, not as shareholders, but in some other character. Now, of course if I found that prohibition in the Act I should be bound to give effect to it. It is quite true, as has been pointed out, that there are many clauses which provide for the registration of shares, the return of shares, and so forth, where the shareholders are members of a company, but I am bound to say that, having attended to the very able arguments which have been addressed to me in this case, I do not find anything which is inconsistent with the existence of a company which has both a share capital and members who have constituted themselves such by agreement and who do not hold shares. Now this observation must also be made on that part of the case. Before the passing of the Act it appears to me to be clear that a number of persons might have associated themselves together in a partnership on the terms of certain of them contributing to the capital of the company, and of others of them being liable to the debts of the partnership though not contributing to the capital—that a partnership might have been formed to give effect to the scheme of this association and might have consisted of holders of participating policies who had contracted to become partners and other persons contributing to a guarantee fund and subscribing on the footing of receiving a share of the profits. That would have been perfectly legal. Now the Act has prohibited the formation after the passing of the Act of any association consisting of more than ten persons for the purpose of carrying on banking; and it has further prohibited the formation of any association consisting of more than twenty persons for the purpose of carrying on any other business than banking that has for its object the acquisition of gain to the company, association, or partnership, or by the individual members thereof, unless it be registered under the Act. In my judgment the scheme of this company would have brought it within the definition of a company which has for its object the acquisition of gain, having regard to the decisions which have been come to on the meaning of the word "gain"; the result would be, therefore, that if this company could have been formed at common law before the passing of this Act, but could not carry on business except as a registered company after the passing of the Act, and could not be registered because it had the two classes of members, the Act would be indirectly prohibiting the future formation of a species of partnership which was perfectly legitimate before. That is a conclusion which clear words would undoubtedly lead to, if such words had been found, but which, in my judgment, I ought not to arrive at unless the Act is clear in requiring it. Further than that, I must add this: The 23rd section containing in itself a definition which is intended to be final and conclusive of a member, I do not think I ought, without being clear upon the general structure of the Act, to add any condition or predicate to the conditions and predicates therein expressed. I have already pointed out that I do not find anything which appears to me clearly to shew that the company cannot be constituted of the two classes of members, and therefore I hold that that argument also fails.

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(1) 1 Ch. D. 620.

The result is, in my judgment, that Miss *Winstone* was a member of the company, and she therefore is a contributory and must be placed upon the list accordingly, and, if necessary, the register of members must be amended; but considering that questions will undoubtedly arise between the two classes of members, I think it desirable that in placing her on the list of contributories it should be indicated that she is placed there in respect of the policy. Probably the better way would be that the Chief Clerk should divide the list of contributories into three classes, those coming there as shareholders, those who are there as holders of policies, and those who are there in both characters; and it appears to me that I should give the costs of the official liquidator out of the estate, but I cannot allow the costs of the contributories who appear by Mr. *Higgins*, as they are sufficiently represented by the official liquidator.

Mr. *Higgins*:—Of course this will not bind any other policy-holder.

Fry, J.:—It may or it may not. It is very probable that any other policy-holder who comes before me will come before me at his own risk.

Solicitors: *G. Blagden; V. I. Chamberlain; Randall & Angier.*

FRY, J.
1879
June 13.

In re PATENT VENTILATING GRANARY COMPANY.

Company—Reduction of Capital—Consent of Creditors—Deposit of Amount of Debt—Limit of Time for use of Words "and Reduced"—Companies Act 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 13, 14.

On the hearing of a petition by a company for the confirmation of a special resolution for the reduction of its capital, three debenture holders for sums amounting together to £4000, who had not consented in writing to the proposed reduction and had not attended in Chambers to object, in pursuance of the ordinary notices and advertisements, did not appear:—

Held, that they could not be taken to have consented to the reduction, but that a consent brief on their behalf must be produced, or the amount of their debentures must be deposited in Court.

In re Crédit Foncier of England (1) not followed.

Held, also, that the company must continue to use the words "and reduced," as part of their name, for fourteen days.

THIS was a petition by the *Patent Ventilating Granary Company, Limited*, which carried on business in *London* and *Southwark*, under the Companies Acts, 1867 and 1877, to obtain the sanction of the Court to a special resolution, passed and confirmed at two extraordinary general meetings of the company, for the reduction of the capital of the company from £100,000, divided into 5000 shares of £20 each, to £75,000, divided into 5000 shares of £15 each. The whole of the shares had been issued, and £15 per share had been paid up. On the 24th of January, 1879, Vice-Chancellor *Malins* made an order referring the petition to Chambers for inquiries; and on the 30th of January, 1879, an order was made in Chambers directing an inquiry what were the debts, claims, and liabilities of or affecting the company on the 14th of March, 1879. On the 29th of April, 1879, the Chief Clerk made his certificate, finding that on the 14th of March, 1879, the debts, claims, and liabilities of or affecting the company amounted to £18,098 12*s*. Of this sum £17,000 was due to seventeen persons on the security of debenture bonds of the company, the sums due to those persons varying from £4000 to £50. The balance of £1098 12*s*. was due to various unsecured creditors. The Chief Clerk certified that there was no evidence before him that any of the creditors had consented in writing to the proposed reduction, but none of them had attended before him and objected thereto. Notice of the presentation of the petition had been advertised in the *London Gazette* and three other *London* newspapers. The petition now came on to be heard. All the unsecured creditors had been paid, except one for £1047, who consented to the prayer of the petition, and one for 30*s*. All the debenture holders (except three, whose debts amounted to £4000) appeared by counsel and consented. No other persons had come in and made any claims against the company. The usual notices had been given and advertisements issued.

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(1) Law Rep. 11 Eq. 356.

Higgins, Q.C., and *J. Bryce*, for the Petitioners:—

The three debenture holders who do not appear must be taken to have assented: *In re Crédit Foncier of England* (1).

H. T. Banning, for all the debenture holders, except the three in question, consented to the reduction.

FRY, J.:—

You must produce a consent brief on behalf of the three debenture holders, or you must pay £4000 into Court to answer their debts. The creditor for 30*s*. must be paid, or the amount must be deposited. The company must continue to use the words "and reduced" as part of their name for fourteen days.

Solicitors: *Druce, Sons, & Jackson.*

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(1) Law Rep. 11 Eq. 356.

FRY, J.
1879
June 17.

PARKER *v.* LECHMERE.

[1878 P. 125.]

Husband and Wife—Wife's Chose in Action—Reduction into Possession—Gift by Husband to Wife.

A legacy, to which a married woman was entitled under a will, was paid by the executors by means of a cheque for £995, drawn to the order of the husband and wife. The husband and wife indorsed the cheque, and then went together to the husband's bankers, when the wife handed the cheque to the manager, and, in the presence and with the assent of the husband, told the manager to open an account in her own sole name, and to place to the credit of it £800, part of the £995, and to credit the residue to the husband's current account. This was done, and the wife afterwards, from time to time, drew cheques on the amount in her sole name. The husband never interfered with the account. The wife drew various cheques, for amounts varying from £20 to £50, in favour of the husband, for the purpose of those sums being employed by him in his business. Part of the money was, by the wife's directions, invested by the bankers in the purchase of some bonds, they sending her a memorandum which stated that they held the bonds as her property. The husband afterwards asked the wife to sign a memorandum charging her money and securities with the payment of the overdrawn balance of his account with the bankers, but she refused to do so:—

Held, that the legacy had never been reduced into possession by the husband.

Semble, that even if it had been reduced into possession, there had been a gift of the £800 by the husband to the wife.

THIS was an action by a married woman, by a next friend, against the members of the firm of *Lechmere & Co.*, bankers, the trustees in the liquidation of her husband, and the husband; claiming a declaration that the Plaintiff was entitled for her separate use to a sum of £105 2*s.* 11*d.* in the hands of *Lechmere & Co.* as bankers, and standing in the name of the Plaintiff in their books, and also to the sum of £300, bonds of the Foreign and Colonial Government Trust, held by them on account of the Plaintiff; or else that a proper settlement might be made of the money and securities for the benefit of the Plaintiff and her children under the direction of the Court.

The facts, which were not in dispute, were as follows:—

Under the will of a Mrs. *Risdon*, who died in December, 1870, the Plaintiff was entitled to a legacy which was, when the estate was wound up, represented by a sum of £995 8*s.* 10*d.* In May, 1871, the executors drew a cheque on their bankers for £995 8*s.* 10*d.*, payable to the order of *W. W. Parker* (the Plaintiff's husband), and *Lydia*, his wife (the Plaintiff). The Plaintiff and her husband received the cheque from the executors, and signed a joint receipt for the £995 8*s.* 10*d.* On the 16th of May, 1871, the husband and wife, having first duly indorsed the cheque, went together to the bank of *Lechmere & Co.*, and the Plaintiff then handed the cheque to the manager, and, in the presence and with the consent of her husband, instructed the manager to open an account in her own sole name, and to place to the credit thereof £800, part of the proceeds of the cheque, and to credit £195 8*s.* 10*d.*, the residue, to the account of her husband, who had a current account with *Lechmere & Co.* An account was accordingly opened by *Lechmere & Co.* with the Plaintiff in her own sole name, and the £800 was credited to that account. A bank-book was delivered to the Plaintiff, and she alone signed her name in the book of the bankers as being the person whose signature was to be honoured in respect of the moneys standing to the credit of that account. The £195 8*s.* 10*d.* was carried to the credit of the husband's account. Soon after the opening of the account the Plaintiff authorized the manager, in writing, to invest a part of the moneys standing to the credit of her account in her name, and on the 7th of June, 1871, he handed to her a written memorandum, on behalf of the bank, addressed to her, stating that "we hold for safe custody the following bonds which are your property—£300 Foreign and Colonial Government 5 per Cent. Bonds." These bonds had been purchased by the manager by means of part of the moneys then standing to the credit of the Plaintiff's account. The Plaintiff from time to time drew cheques on the account in her name, all of them being signed by her alone, and the husband never interfered with the account. *Lechmere & Co.* always considered the account as the separate account of the Plaintiff, and always honoured the cheques drawn by the Plaintiff alone on the account. The Plaintiff from time to time drew on the account cheques in favour of her husband, for sums varying from £20 to £50, for the purpose of those sums being employed by him in his business. Those sums together amounted to £528. In July, 1877, the husband's account with *Lechmere & Co.* was overdrawn, and the manager of the bank suggested that the husband should obtain the Plaintiff's signature to a memorandum charging the money and securities in her name with the payment of the overdrawn balance. A memorandum was accordingly prepared, but the Plaintiff refused to sign it, though her husband requested her to do so. On the 7th of December, 1877, the husband filed a liquidation petition under the *Bankruptcy Act*, 1869, and trustees of his estate were appointed. The action was commenced on the 3rd of June, 1878. There was then standing to the credit of the Plaintiff's account the sum of £105 2*s.* 11*d.*, and the bankers had also in their hands the £300 Foreign and Colonial Government Trust bonds. The trustees in the husband's liquidation claimed the money and the bonds. No settlement had been made on the Plaintiff, and she had no other property.

The action now came on upon motion for judgment.

Millar, for the Plaintiff:—

The fund has never been reduced into possession by the husband, or if it ever has, there has been a valid gift of it by the husband to the wife: *Nicholson* v. *Drury Buildings Estate Company* (1); *Prole* v. *Soady* (2); *Spence*, Eq. Jurisprudence (3).

Locock Webb, Q.C., and *J. Chester*, for the trustees of the husband:—

The fund has been reduced into possession of the husband; the bankers were his agents: *Lloyd* v. *Pughe* (4). The transaction might be impeached as a voluntary settlement: *Stileman* v. *Ashdown* (5). To support the transaction as a gift by the husband to the wife there must be clear and distinct evidence, apart from the act itself, of his intention that the money should belong to her. In the eye of the law the money was the husband's, and the act itself was ambiguous. The husband might merely intend to make the wife his agent, and there was no declaration of his intention. Everything was consistent with a mere scheme to retain the real control of the money while giving the nominal control to the wife. "To constitute a gift between husband and wife there must be a clear irrevocable gift to a trustee for the wife, or some clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of the wife": *White* and *Tudor's* Leading Cases (1); *Mews* v. *Mews* (2). It is immaterial what was the original source of the fund, provided that it was not the wife's separate estate. In *Mews* v. *Mews* the husband actually borrowed from the wife's fund, and afterwards repaid to her the sum which he had borrowed. This was a very strong representation that the money was hers, not his, and yet it was held that there had been no gift to the wife. In the present case there is no indication of any intention to give to the wife except the permitting her to perform the mere ministerial act of signing cheques.

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(1) 7 Ch. D. 48.

(2) Law Rep. 3 Ch. 220.

(3) Vol. ii. p. 478.

(4) Law Rep. 14 Eq. 241; Ibid. 8 Ch. 88.

(5) 2 Atk. 477.

T. A. Roberts, for the bankers.

FRY, J.:—

It appears to me that the bonds and the balance in the hands of the bankers belong to the Plaintiff. The first question is whether there was ever any reduction into possession of the legacy by the husband. [His Lordship stated the facts as to the receipt of the legacy and the opening of the account with the bankers.] The arrangement resulted in this: The bankers were to receive the sum of money represented by the executors' cheque, and were then to become indebted to the husband in the sum of £195 8*s*. 10*d*., part of it, and to hold £800, the residue, for the wife. In other words, a *chose in action* of £800 was created in favour of the wife. To use the language of Lord Justice *Mellish* in *Lloyd* v. *Pughe* (3), the husband induced a third person to hold the money to the use of the wife. The arrangement so made was acted upon, and the wife was in the habit of drawing cheques upon the bankers in her sole name; the husband appears to have had no power to interfere with the account, and never in fact

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(1) 5th Ed. vol. i. p. 535.

(2) 15 Beav. 529.

(3) Law Rep. 8 Ch. 90.

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interfered with it. £300, part of the fund, was invested by the bankers in some bonds by the wife's order, and they gave her a memorandum which stated that they held the bonds as her property. The husband was in want of money, and applied to the wife for it; she acceded to his request, and from time to time drew cheques upon the account in his favour. In July, 1877, he applied to her at the request of the bankers to sign a memorandum, charging the balance of her account with the payment to them of the overdrawn balance of his own account, but she declined to sign it. Neither the husband, however, nor the bankers suggested that the money was not hers. It seems to me that there is no ambiguity; the bankers agreed to hold the money as a *chose in action* of the wife. Was the money at any moment of time in the actual possession of the husband, or under his sole control? I think it was not. It is true that the original cheque could only be received by the husband and wife; but the husband indorsed it, and it was then presented by the wife alone to *Lechmere & Co.*, and the money thereupon became a *chose in action* of the wife. I hold, therefore, that there was no reduction into possession by the husband. Even if there had been a reduction into possession, I should probably have held that there had been a gift of the money by the husband to the wife. I think that *Mews* v. *Mews* (1) is in favour of that view; but it is not necessary that I should express a decided opinion on this point. I give judgment for the Plaintiff in the terms of her claim.

Solicitors for Plaintiff: *Duignan & Smiles*, agents for *Moores & Romney, Tewkesbury.*

Solicitor for Bankers: *G. Badham.*

Solicitors for Trustees: *Miller & Miller.*

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(1) 15 Beav. 529.

[illegible]
[illegible]

MOODY *v.* STEGGLES.

[1878 M. 121.]

FRY, J.

1879

June 24.

Easement—Sign-board of Public-house—Twenty Years User—Implication of Grant.

20ChD776

The Plaintiffs, the owners of a public-house, claimed the right to affix a sign-board to the wall of the Defendants' house. The sign-board had been so affixed for upwards of forty years. The two houses had formerly belonged to the same owner, the Defendants' house having been granted away by him before the Plaintiffs' house. When he first became owner of the two houses the Plaintiffs' house was not occupied as a public-house. It did not, however, appear whether the sign-board was first affixed to the Defendants' house during the common ownership:—

Held, that it could not be assumed that it was first affixed during the common ownership:

Held, also, that the easement claimed was a legal one, and that a grant of it by the Defendants' predecessors in title to the Plaintiffs' predecessors in title must be presumed.

And an injunction was granted to restrain the Defendants from removing the sign-board.

THE Plaintiffs were *Harriet Moody*, the owner in fee, and *George Webb*, the tenant and occupier, of a public-house, called the *Grosvenor Arms*, situate in a narrow side street or yard, called *Grosvenor Yard*, opening into *High Street*, in the town of *Newmarket*. The Defendants were *Mary Ann Steggles*, widow, the owner in fee, and *P. W. Vaughan*, and *Albert Steggles*, the occupiers with her, of a house situate at the corner of *High Street* and *Grosvenor Yard*, and immediately adjoining the Plaintiffs' house. The Defendants' house projected in front of the Plaintiffs' house, so that the Plaintiffs' house could not be seen from the *High Street*. There had been for many years affixed to the side-wall of the Defendants' house a sign-board bearing the name of the public-house. The Defendants in April, 1878, pulled down the sign-board, and the Plaintiffs replaced it.

The Plaintiffs claimed an injunction to restrain the Defendants from removing the sign-board and from preventing the Plaintiffs from affixing it to the Defendants' house, and damages in respect of the wrongful removal.

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The Plaintiffs alleged that for not less than forty years before the commencement of the action their house had always been occupied as a public-house, and that during the whole of that period, or at any rate during not less than twenty years next before the commencement of the action, the occupiers of the public-house, for the more profitable and beneficial occupation thereof, had always as of right, and without any interruption, kept the sign-board affixed to the Defendants' house (except when it was pulled down by the Defendants in April, 1878). The sign-board when so affixed could be readily seen from *High Street*, and the right to keep it so affixed was of great value to the Plaintiffs.

By their statement of defence the Defendants denied that the signboard had ever been kept affixed to their house by the occupiers of the public-house as of right, and said that it had been affixed by the license and permission of the occupier for the time being of their house. The Defendants also said that they had removed the sign-board because it caused a great nuisance to them by the creaking and groaning noise which it made when swinging backwards and forwards in the wind. The Defendants insisted that they had a right to remove the sign-board, and, by way of counter-claim, they asked an injunction to restrain the Plaintiffs from interfering with the Defendants in removing the sign-board, and from affixing it to the Defendants' house, or otherwise from affixing it, or keeping it affixed, so as to be a nuisance to the Defendants.

This was the trial of the action. The effect of the evidence is stated in the judgment of the Court.

North, Q.C., and *Stirling*, for the Plaintiffs:—

An easement such as that which we claim is a legal one: *Wood* v. *Hewett* (1); *Lancaster* v. *Eve* (2); *Hoare* v. *Metropolitan Board of Works* (3). The latter case is almost exactly like the present; the question was whether the right to have a sign-post standing on a common in front of a public-house was an estate, interest, or right of a profitable or beneficial nature within the meaning of sect. 15 of the *Metropolitan Commons Act*, 1866, and it was held that it was, because it was a right which the lord of the soil could grant. The evidence proves that the sign-board has been fixed to the Defendants' house for upwards of forty years, and this raises a presumption of a grant by the owner of the Defendants' house of the right to affix it. We are therefore entitled to the relief which we ask.

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(1) 8 Q. B. 913.

(2) 5 C. B. (N.S.) 717. 583 Jink J

(3) Law Rep. 9 Q. B. 296.

Cookson, Q.C., and *Maidlow*, for the Defendants:—

Our evidence shews that the creaking of the sign-board causes an intolerable nuisance. This nuisance has increased as the sign-board has grown older. There can be no prescription for a nuisance which changes from time to time. The proper inference from the evidence is that the sign-board was put up when there was a common ownership of the two tenements. *Primâ facie* it belongs to the owner of the house to which it is fixed as part of his freehold, and therefore it would pass on the severance of the common ownership to the Defendants' predecessor in title. The *onus* is on the Plaintiffs to displace this *primâ facie* title. How could it by mere lapse of time become converted into an easement attached to the Plaintiffs' house? *Wood* v. *Hewett* (1), and *Lancaster* v. *Eve* (2) were both cases of an easement essential to the reasonable use and enjoyment of the Plaintiffs' tenement, and they both shew that the Court will have regard to the particular circumstances of each case. In *Hoare* v. *Metropolitan Board of Works* (3) the question was as to the construction of the *Metropolitan Commons Act*. The Court will not infer a right which is more extensive than the user; it will seek to impose as small a burden as possible on the owner of the servient tenement. It will rather infer a mere personal license than a grant of a perpetual right, both inferences being equally consistent with the user. The proper inference is that the right or benefit was annexed to the business of the particular occupier, not to the tenement itself: *Thomas* v. *Hayward* (4). The sign-board is nothing more than an advertisement; its function is discontinuous.

[FRY, J.:—An easement is not necessarily limited by the actual user; its limit is the grant which the Court infers: *Baxendale* v. *McMurray* (1).]

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(1) 8 Q. B. 913.
(2) 5 C. B. (N.S.) 717. 5 Jur NS 683.
(3) Law Rep. 9 Q. B. 296.
(4) Ibid. 4 Ex. 311.

The recent case of *Wheeldon* v. *Burrows* (2), following *Suffield* v. *Brown* (3), shews that where the owner of two tenements grants one of them he must, if he intends to reserve to himself in respect of the tenement which he retains any easement over the tenement which he grants, reserve it expressly. No such reservation will be implied.

The right now claimed is not one which will run with the land: *Keppell* v. *Baily* (4). The Court discourages novel burdens on land: *Hill* v. *Tupper* (5); *Ackroyd* v. *Smith* (6); *Angus* v. *Dalton* (7); *Arkwright* v. *Gell* (8).

[FRY, J., referred to *Drewell* v. *Towler* (9).]

In all the cases cited the easement was a right to put a chattel on the soil of the servient tenement; that is something quite different from a right to affix a chattel to a wall which may be pulled down. Moreover, in the present case there is no physical connection between the dominant tenement and the easement. The action ought to be dismissed, and the relief asked by the counter-claim should be granted.

FRY, J.:—

It is in evidence that, for a period of from forty to fifty years at least, a sign-board has been hung against the side of the Defendants' house, and at the entrance to *Grosvenor Yard*, thereby inviting passengers going along the *High Street* of the town to the Plaintiffs' public-house.

The sign-board having remained there for that length of time, and it not having been shewn that it was erected by the license or permission of the Defendants, or of their predecessors in title, and it being evidently convenient, and in one sense necessary, for the enjoyment of the Plaintiffs' premises, I think I am bound, if I can do so, to presume a legal origin and continuance to that fact.

(1) Law Rep. 2 Ch. 790.
(2) *Ante*, p. 31.
(3) 4 D. J. & S. 185.
(4) 2 My. & K. 517.
(5) 2 H. & C. 121.
(6) 10 C. B. 164.
(7) 3 Q. B. D. 85; 4 Q. B. D. 162.
(8) 5 M. & W. 203.
(9) 3 B. & Ad. 735.

10 Jan [illegible]

Where there has been a long enjoyment of property in a particular manner it is the habit, and, in my view, the duty, of the Court, so far as it lawfully can, to clothe the fact with right.

Looking at all the facts of this case, I feel myself both justified in coming, and bound to come, to the conclusion that the chattel, the sign-board, was placed by the Plaintiffs' predecessors in title on the Defendants' house, not with the view of allowing it to become part of the property of the Defendants' predecessors in title, but by virtue of some easement granted by them to the Plaintiffs' predecessors in title. In coming to that conclusion, I feel myself entirely justified by the three cases which have been cited: *Wood* v. *Hewett* (1), *Lancaster* v. *Eve* (2), and *Hoare* v. *Metropolitan Board of Works* (3).

It is said, however, that in the present case there are circumstances which prevent the application of the principle there laid down. The first thing on which reliance is placed is the early common ownership of the tenements. The history of that, so far as it appears from the evidence before me, is this: on the 7th of January, 1819, the house, now the Plaintiffs', was purchased by one *Parkinson*, who at that time was the owner of the Defendants' house, and therefore, on and after the 7th of January, 1819, the two tenements became the property of *Parkinson*. At that time, however, the Plaintiffs' house was not occupied as a public-house, but, apparently, as a private house.

The next date of which we have any knowledge is 1833. At that time *Parkinson* was dead, and his devisees conveyed the Plaintiffs' house to Mr. *Moody*, the predecessor in title of the present Plaintiffs. Before that date, but how long before I do not know, the Defendants' house had been conveyed by *Parkinson*, or his devisees, to one *George Bloom*, or to a predecessor in title of *George Bloom*.

On these facts it is suggested that I ought to infer that the sign-board was erected whilst the two tenements were the common property of *Parkinson*, or of his devisees. I think I cannot come to that conclusion, because there is no evidence to shew whether the Plaintiffs' house was converted into a public-house before or after the Defendants' house was conveyed away by *Parkinson* or his devisees. It is quite consistent with the facts in evidence that the Defendants' house may have been alienated by *Parkinson* or his devisees years before the Plaintiffs' premises were converted into a public-house, and years before the sign-board was fixed. That argument, therefore, in my judgment, fails. What would have been the result if the Defendants had proved the erection of the sign-board during the common ownership it is unnecessary for me to say.

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(1) 8 Q. B. 913.

(2) 5 C. B. (N.S.) 717. 5 Jur NS 683.

(3) Law Rep. 9 Q. B. 296.

The next point taken on behalf of the Defendants is this: It is said that the easement in question relates, not to the tenement, but to the business of the occupant of the tenement, and that therefore I cannot tie the easement to the house. It appears to me that that argument is of too refined a nature to prevail, and for this reason, that the house can only be used by an occupant, and that the occupant only uses the house for the business which he pursues, and therefore in some manner (direct or indirect) an easement is more or less connected with the mode in which the occupant of the house uses it. To illustrate this by the cases which have been cited. The easement which was upheld in *Wood* v. *Hewett* (1) was to have a hatch in another man's soil. The hatch was only useful to the tenement so long as the plaintiff occupied it as a miller. Therefore, in that sense, the easement was connected with the business of the occupant. So in *Lancaster* v. *Eve* (2) the easement was to have a pile fixed in the waterway of the *Thames*, which was useful so long only as the occupant of the plaintiff's premises used them for the purposes of a wharf. Similarly in *Hoare* v. *Metropolitan Board of Works* (3), which is still more like the present case, the easement was to have a sign-board supported by a pole fixed into the common, an easement which could be useful only so long as the occupant used the house for some purpose which rendered an invitation to the public desirable. I think, therefore, that that argument also fails.

Two other arguments have been addressed to me by Mr. *Maidlow*. First he says, Although you may have an easement for the support of a sign-board from the soil direct, you cannot have such an easement for the support of a sign-board from a wall which is fixed into the soil. That argument appears to me to be untenable, because for all purposes of support the wall must be taken to be part of the soil. It is part of the freehold. I know no reason why a sign-board should not be supported by a wall as well as by a direct connection with the soil. Again, it is said there must be a physical connection between the dominant tenement and the easement. I am not aware that such law has ever been laid down. The cases to which I have been referred are inconsistent with the theory. There was no physical connection between the hatch, which was the subject of the discussion in *Wood* v. *Hewett* (1), and the plaintiff's mill. The easement there was to have the chattel on the defendant's land, although the chattel was not connected physically with the plaintiff's tenement, and the same observation applies to *Hoare* v. *Metropolitan Board of Works* (2), and also with more or less distinctness to *Lancaster* v. *Eve* (3). And I may observe that, for a very long period, the Courts have in certain cases substituted, what I may call a metaphysical, for a physical connection with the soil. The old cases which have gone to shew that chattels physically capable of being disconnected from the tenement are nevertheless part of the freehold illustrate that principle. Everybody knows that a key, although in its nature a chattel, belongs to the house, and passes with the freehold, and that the mill-stone, which is capable of being detached from the mill, is nevertheless part of the fee simple of the mill, and passes with it. Those cases shew that physical connection is not always necessary even to constitute a particular thing an integral part of a freehold.

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(1) 8 Q. B. 913.

(2) 5 C. B. (N.S.) 717. 5 Jur NS 60

(3) Law Rep. 9 Q. B. 296.

One other argument remains to be considered. It is said that the sign-board creaks, and that the Plaintiffs have no right to cause the annoyance which is produced by the creaking. It appears to me from the evidence that the sign-board, if I may use such an expression, creaks from its own nature. It is not easy, probably not possible, to expose a wide surface of metal, such as this sign-board appears to be, to the action of the wind down this passage without causing some creaking, and it appears to have always creaked more or less. The whole case with regard to the creak-

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(1) 8 Q. B. 913.

(2) Law Rep. 9 Q. B. 296.

(3) 5 C. B. (N.S.) 717.

5 Jun 1883.

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ing is of a trumpery description, and it does not appear to me that there has been any creaking in excess of what is naturally incidental to a sign-board, and certainly in the later exercise of her right the Plaintiff has studiously desired to minimise the inconvenience to the Defendants, because the sign-board has been erected with india-rubber washers, which undoubtedly have diminished the noise to the greatest possible extent. Therefore, that defence appears to me to be insignificant and idle. The result is that, in my judgment, the Plaintiffs are entitled to the injunction which they seek. It will be an injunction to restrain the Defendants from pulling down and removing the sign-board from the Defendants' house, and from preventing the Plaintiffs from affixing it to the Defendants' house. The Defendants must pay the costs of the action. I dismiss the counter-claim with costs.

Solicitors for Plaintiffs: *Aldridge, Thorn, & Morris*, agents for *Robert Fenn, Newmarket.*

Solicitors for Defendants: *Ford, Lloyd, & Bartlett*, agents for *J. Neal York, Newmarket.*

FRY, J.
1879
June 30.

In re BAILEY.
BAILEY *v.* BAILEY.

[1876 B. 498.]

Will—Construction—Real Estate—Charge of Debts—Direction that Executors shall pay Debts—Devise to Executors.

20 Ch D 470
471-4-6

When a testator directs that his debts shall be paid by his executors, and also devises real estate to them, either beneficially or on trust, it is a question of intention to be collected from the whole will whether the estate so devised is charged with the payment of the debts.

Warren v. *Davies* (1) explained.

THIS was an action for the administration of the real and personal estate, and the execution of the trusts of the will, of *John Bailey*, who died on the 26th of April, 1874.

By his will, dated the 18th of October, 1870, the testator directed that "all my just debts, funeral and testamentary expenses, may be paid by my executors hereinafter named as soon as conveniently may be after my decease." And he appointed his brother, *William Bailey*, and his son, *J. T. Bailey*, trustees and executors of his will. He bequeathed to his wife, the Plaintiff, all his household furniture, plate, books, and other household effects. He bequeathed to his trustees two leasehold messuages situate in *Lancaster Road, Notting Hill*, and two leasehold stables adjoining one of them, upon trust to pay the rents thereof to his daughter *Emma Roberts*, for her separate use without power of anticipation; and after her death he directed his trustees to sell the houses and stables, and to stand possessed of the proceeds of sale for the children of *Emma Roberts* equally at twenty-one or marriage. If no object of the last preceding trust should become entitled to an absolute vested interest, then the property and the proceeds of sale were to sink into his residuary estate. The testator devised to his trustees two freehold houses situate at *Paignton*, on trusts for the benefit of his daughter *Theresa Trist Carter* and her children. If no child of hers should become entitled to an absolute vested interest, the property was to sink into the residuary estate. He devised to his son *J. T. Bailey* in fee a freehold field called *Brimhill*, and certain other freehold hereditaments situate at *Paignton*. And he devised and bequeathed to his son *W. T. Bailey* absolutely some leasehold property at *Notting Hill*, and seven freehold cottages and other freehold hereditaments situate at *Paignton*. And he devised and bequeathed to his trustees a freehold house and some leasehold houses, situate at *Paignton*, upon trusts in favour of his daughter *Amelia Trist Pope* and her children similar to those previously declared in favour of his daughter *Emma Roberts* and her children, with a similar limitation over in default of any children of Mrs. *Pope* acquiring an absolute vested interest. And he devised to his trustees some other freehold property situate at *Paignton*, upon similar trusts in favour of his daughter *Charlotte Trist Toole* and her children, with a similar ultimate limitation. And, as to all the residue of his estate, both real and personal, he devised and bequeathed the same to his trustees, upon trust for sale and conversion and investment, and to pay the income to his wife (the Plaintiff) for her life and widowhood. And from and after her marriage again he directed his trustees to pay her an annuity of £30. And from and after her marriage again (subject to the annuity), and from and after her death, he directed his trustees to sell his residuary real estate, and to convert his residuary personal estate into money, and to divide the proceeds equally between his six children (already named) as tenants in common.

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(1) 2 My. & K. 49.

The testator died on the 26th of April, 1874. His wife and his six children survived him. His brother *William Bailey* died before him, and the will was proved by the son *J. T. Bailey* alone. The widow was the Plaintiff in the action; the executor *J. T. Bailey* was the Defendant. On the 17th of November, 1876, judgment was given for the execution of the trusts of the will, and various accounts and inquiries were directed. The personal estate was insufficient for the payment of the testator's debts. The action now came on for further consideration. The principal question for determination was whether the real estate specifically devised by the testator on trust for his daughters and their children, and that which was devised to his son *J. T. Bailey*, who was one of his executors, beneficially, were charged with the payment of the testator's debts.

Burton Buckley, for the Plaintiff:—

The estates devised to the executors on trust for the daughters and their children do not stand in a different position from that which is devised to *J. T. Bailey* for his own benefit. It would be an extraordinary intention to attribute to the testator to suppose that he meant his daughters' shares, which are settled merely because they are daughters, to pay his debts, in preference to the shares given to his sons. He evidently intended to divide his property equally among his children. In *Henvell* v. *Whitaker* (1) and in *Finch* v. *Hattersley* (2) it was held that, where a testator had directed his debts to be paid by his executor, the executor must, if the personal estate was insufficient, satisfy the debts out of real estate devised to him by the testator. But that was founded on the notion of a personal obligation upon the executor, as a condition of the benefit given to him, to discharge the debts. And, real estate not being at that time subject to the payment of

(1) 3 Russ. 343.

(2) 3 Russ. 345, n.

debts, the Court laid hold of any indication of an intention that the debts should be satisfied by means of it. In *Symons* v. *James* (1), in which there was a similar direction that the executors should pay the testator's debts, it was held, on the construction of the whole will, that real estate devised to the executors was not charged with the payment of the debts. Vice-Chancellor *Knight Bruce* held that the question was one of intention. In *Hartland* v. *Murrell* (2) it was, no doubt, decided that, there being a direction that the debts should be paid by the executors, the debts were charged on real estate devised to the executors, although they took no beneficial interest in it. But there would not have been in that case, as there would be in the present case, an unequal incidence of the debts as between different devisees.

Bristowe, Q.C., and *H. Fellows*, for the Defendant, *J. T. Bailey* :—

The real estate devised to the two executors on trust is charged with the debts, but that which is devised to *J. T. Bailey* beneficially is not so charged. The rule is that a direction that the executor shall pay the debts, coupled with a devise to him, creates an implied charge of the debts on the devised estate, and it does not signify that the estate is only devised to him on trust; *Wasse* v. *Heslington* (3); *Harris* v. *Watkins* (4); *Warren* v. *Davies* (5). The last case is almost identical with the present. There Sir *John Leach*, M.R., said: "Where a testator directs his debts and legacies to be paid by his executors after named, all property given to the persons who are named executors jointly will be charged with the payment of debts and legacies. The devised estate in question is not given to the executors jointly; it is specially devised to *Thomas Davies*, who happens to be one of the executors, but it is not for that reason to be considered as given to the executors and charged with the payment of debts and legacies within the intention of the testator."

[FRY, J.:—In *Cook* v. *Dawson* (6) Lord Justice *Turner* expressed a doubt as to the authority of *Finch* v. *Hattersley* (7).]

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(1) 2 Y. & C. 301.
(2) 27 Beav. 204.
(3) 3 My. & K. 495.
(4) Kay, 438.
(5) 2 My. & K. 49, 51.
(6) 3 D. F. & J. 127.
(7) 3 Russ. 345, n.

But *Warren* v. *Davies* (1) was not cited, and that is a clear authority in favour of our contention.

Sturges, for two of the daughters.

A. Birrell, for another daughter.

FRY, J.:—

The conclusion that the real estate settled upon the daughters and their children is charged with the payment of the testator's debts, while that which is devised to the sons beneficially is not so charged, would not be in accordance with the equality which one would expect to find when a man is making a provision for all the members of his family. Looking at the residuary clause it appears to have been the intention of this testator to divide his property equally among his children. The effect of the decision in *Wasse* v. *Heslington* (2) is, that where a testator directs that his debts are to be paid by his executors, it is *primâ facie* to be considered that he means the payment of them to be made by the funds which come to their hands as executors. That would apply to leasehold property, but not to freehold. But, at the same time, Sir *John Leach* said that the question was one of intention, to be gathered from the whole will, whether all the property which the testator gives to his executors shall be subject to the payment of his debts. It is a simple question of intention, to be gathered from the construction of the whole will. Independently of authority I am unable to find in the present will any intention to subject the specifically devised freehold property to the payment of the testator's debts. But it is said that the question is concluded by what was said by Sir *John Leach* in *Warren* v. *Davies,* that, where a testator directs his debts to be paid by his executors jointly, all property given to them jointly will be charged with the payment of his debts. Here real estate is given to the executors jointly; therefore, it is said, it is subject to the payment of the debts. The question, therefore, is whether the rule thus laid down in *Warren* v. *Davies* applies in all its generality,

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(1) 2 My. & K. 49.

(2) 3 My. & K. 495.

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and in my opinion it does not. That case was decided by Sir *John Leach* in 1834, and I find that in 1835 the same Judge laid it down in *Wasse* v. *Heslington* (1), that the question was one of intention, and held that property which was given to executors was not charged with the testator's debts. I think, therefore, that *Warren* v. *Davies* (2) is not conclusive, and that it remains for me to decide what was the intention of the testator in the present case. I do not think that there is any conflict in the authorities. They appear to me to come to this—that where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, as in *Henvell* v. *Whitaker* (3), or only a life interest, as in *Finch* v. *Hattersley* (4), or no beneficial interest at all, as in *Hartland* v. *Murrell* (5). But, in all the cases in which that has been held, the entirety of the liability has been thrown on the entirety of the estate. That would not be so in the present case; the effect would be to subject the part of the testator's real estate which is devised on trust for his daughters to the liability, and to exempt that part which is devised to his sons. The case of *Harris* v. *Watkins* (6) appears to me to be an authority in favour of this view. There Vice-Chancellor *Wood* said that there is an exception from the general rule when there are two or more executors to whom unequal benefits are given by the will, because "it might appear improbable from the whole instrument that the parties taking unequal benefits were to be liable to the debts in unequal proportions." So, in the present case, the effect of applying the general rule would be one that it is not probable was intended by the testator, and, there being no express words of charge, I feel myself at liberty to come to the conclusion that there was no intention to subject the real estate devised on trust for the daughters to the payment of the debts. I hold, therefore, that neither the estates specifically devised to the sons beneficially, nor those which are specifically devised on trust for the daughters,

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(1) 3 My. & K. 495.
(2) 2 My. & K. 49.
(3) 3 Russ. 343.
(4) 3 Russ. 345, n.
(5) 27 Beav. 204.
(6) Kay, 438.

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are charged with the payment of debts. But I hold that the residuary real estate is charged, by force of the word "residue," coupled with the direction to pay the debts.

Solicitors for Plaintiff and Defendant: *Ravenscroft, Hills, & Woodward.*

Solicitors for daughters: *Rooke & Son; D. Aston.*

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July 1.

PUGH *v.* GOLDEN VALLEY RAILWAY COMPANY.

[1877 P. 276.]

Railway Company—Statutory Powers—Diversion of Private River—Necessity for Construction of Railway—Railways Clauses Consolidation Act, 1845, s. 16.

A railway company is not authorized by sect. 16 of the *Railways Clauses Act*, 1845, permanently to divert the course of a private river, unless the diversion is necessary for the construction of the railway. The diversion cannot be made merely because it will diminish the expense of the construction of the railway.

Reg. v. *Wycombe Railway Company* (1) followed.

Attorney-General v. *Ely, Haddenham, and Sutton Railway Company* (2) distinguished.

Affirmed on Ct of Appeal 15 Ch D 330

THE Defendant company were incorporated, by an Act 39 & 40 Vict. c. cxli., for making a railway in the county of *Hereford* from *Pontrilas* to *Dorstone.* The course of the railway was along the valley of the River *Dore.* That river is a very sinuous stream, its main course being from north to south. The Plaintiff's land was situate on the west side of the river, and was bounded by it. The Defendants purchased two strips of land, A C and B D, from the Plaintiff for the construction of their railway, both these strips lying on the west side of the river. Between them the river took a considerable bend to the west, and to carry on the railway in a straight line the Defendants purchased from another landowner a third strip of land, A B, situate on the east side of the river, and lying in a straight line between the two strips purchased of the

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(1) Law Rep. 2 Q. B. 310.

(2) Law Rep. 4 Ch. 194.

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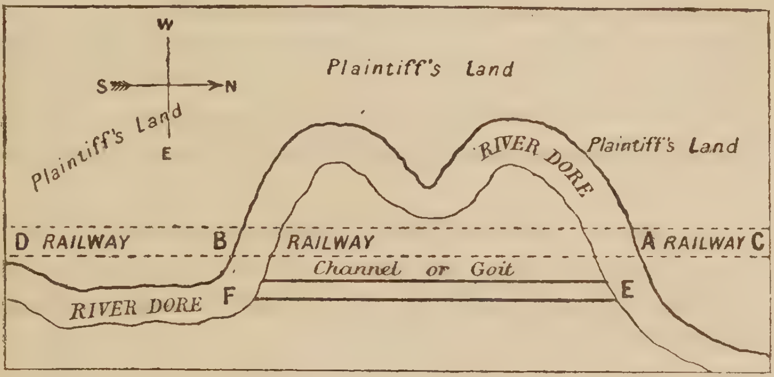
Plaintiff. The railway is shewn by the dotted lines on the annexed plan. It was constructed on an embankment. Instead of crossing the river at the points A and B by means of bridges, the Defendants stopped up the bed of the river at those points by means of their embankment, and cut a new channel or goit for the water from the point E to the point F. The embankment was built by means of earth excavated from the goit. After this was done the greater part of the water of the river flowed down the goit, but a small quantity still flowed along the old bed of the river from A to B, the Defendants having made openings through their embankment to allow it so to flow. The company's special Act contained no express power enabling them thus to divert the river, but with it was incorporated the *Railways Clauses Consolidation Act*, 1845. The Plaintiff alleged that the diversion of the river was not necessary for the construction of the railway, but that it was adopted by the Defendants for the mere purpose of constructing their railway more economically. The Plaintiff claimed an injunction to restrain the Defendants from continuing to obstruct by their embankment the natural flow of the river, and from diverting it into the channel or goit, and damages.



By their statement of defence the Defendants alleged that they had power under the *Railways Clauses Act* to divert the river as they had done, and that the diversion was necessary for the construction and maintenance of the railway.

This was the trial.

Fischer, Q.C., and *Bagnold*, for the Plaintiff:—

The acts of the Defendants cannot be justified under sect. 16 of the *Railways Clauses Act*, 1845 (1). The Defendants are bound to prove the necessity of what they have done: *Reg.* v. *Wycombe Railway Company* (2); *Fenwick* v. *East London Railway Company* (3).

[FRY, J.:—Is not the question whether the company are taking or using your land or only injuriously affecting it? In the one case they must pay for the land before they can take it; in the other case the compensation would be ascertained after the injury was done.]

In *Rangeley* v. *Midland Railway Company* (4) it was held that a railway company could not divert a public footpath on to land of which they had not acquired the ownership. *Reg.* v. *Wycombe Railway Company* shews that under sect. 16 it is incumbent on

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(1) Sect. 6 provides that "The company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

Sect. 16 provides that "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works (that is to say),

"They may (*inter alia*) alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper.

"They may do all other acts necessary for making, maintaining, altering or repairing, and using the railway.

"Provided always, that, in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction . . . . to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

(2) Law Rep. 2 Q. B. 310.

(3) Ibid. 20 Eq. 544, 551.

(4) Ibid. 3 Ch. 306.

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a railway company, before they can permanently divert the course of a public way, to shew that their doing so is necessary to the construction of the railway. It must be a physical necessity, not a mere matter of economy in the construction. This must apply equally to the diversion of a private river. And here the evidence only shews that it is a mere question of expense; there is no engineering necessity for the diversion. There would have been no difficulty in building two bridges. Nor can the company justify what they have done as a reasonable use of the water of the river by one riparian proprietor as against another: *Bickett* v. *Morris* (1); *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (2).

[They were stopped by the Court.]

North, Q.C., and *Speed*, for the Defendants:—

The Defendants are only injuriously affecting the Plaintiff's land, and compensation must be assessed and paid after the injury is done: *Hutton* v. *London and South Western Railway Company* (3).

Sect. 6 of the *Railways Clauses Act* does not apply to the case; it turns entirely on the construction of sect. 16. Either *Reg.* v. *Wycombe Railway Company* (4) does not apply, or, if it does, we say that that decision was wrong. The ordinary rule is that, in the absence of bad faith, the Court accepts the certificate of the company's engineer on the question whether it is necessary that the company should take any particular land: *Stockton and Darlington Railway Company* v. *Brown* (5). And in *Sadd* v. *Maldon, &c., Railway Company* (6) the same principle was applied to sect. 16. It was held that the company might take land for the construction of works mentioned in sect. 16, although the works were not necessary, but only convenient for the purposes of the company. That is an authority precisely in our favour; it was cited in *Reg.* v. *Wycombe Railway Company*, and the Court did not affect to overrule it. When sect. 16 says that the company "may do all other acts necessary for making" the railway, the natural inference is that the qualification of necessity does not apply to the things which are expressly specified. If it had been intended that it should, it would have been easier to say "all things necessary," without enumerating so many particulars. *Reg.* v. *Wycombe Railway Company* (1) was the case of a public road, not that of a private river. There are other sections in the Act, sects. 46, 53, which deal with roads; sect. 16 is the only one which deals with rivers. Moreover, in that case the return to the mandamus put forward the question of necessity, and it was assumed that that was the question, and the judgment was founded on that assumption. The attention of the Court was directed to an interference with the rights of the public. *Attorney-General* v. *Ely, Haddenham, and Sutton Railway Company* (2), was also the case of a public road. *Reg.* v. *Wycombe Railway Company* was not cited there, and some of Lord *Hatherley's* observations are inconsistent with it. In *Fenwick* v. *East London Railway Company* (3) the present question did not really arise. *Reg.* v. *Wycombe Railway Company* is the only authority against us, and it is inconsistent with *Sadd* v. *Maldon and Braintree Railway Company* (4). It does not really amount to more than a *dictum*, and in *Dowling* v. *Pontypool, &c., Railway Company* (5), Vice-Chancellor *Hall* did not entirely approve of it.

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(1) Law Rep. 1 H. L., Sc. 47.
(2) Ibid. 7 H. L. 697.
(3) 7 Hare, 259.
(4) Law Rep. 2 Q. B. 310.
(5) 9 H. L. C. 246. 6 Jur. N.S. 1168
(6) 6 Ex. 143.

[FRY, J.:—It seems to have been treated as a binding authority in *Lord Beauchamp* v. *Great Western Railway Company* (6).]

In *Reg.* v. *East and West Indian Docks Railway Company* (7) Lord *Campbell* said that the provision in sect. 16 that the company shall do as little damage as may be and shall make full satisfaction, does not apply to what is to be done in the exercise of their powers, but to the manner of doing it.

Fischer, in reply:—

Reg. v. *Wycombe Railway Company* has given a judicial construction to sect. 16, and it is a binding authority. If it is inconsistent with *Sadd* v. *Maldon and Braintree Railway Company*, it is later in time and ought to be followed in preference. *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (1) is also an authority for the relief which we claim.

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(1) Law Rep. 2 Q. B. 310.
(2) Ibid. 4 Ch. 194.
(3) Ibid. 20 Eq. 544.
(4) 6 Ex. 143.
(5) Law Rep. 18 Eq. 714, 742.
(6) Ibid. 3 Ch. 745.
(7) 2 E. & B. 466.

17 Jun 1181

FRY, J., after stating the facts, continued:—

It is not in controversy that some injury has been done to the Plaintiff by the diversion of the stream. That which was formerly a pleasant and free-flowing stream will probably now be turned into a sluggish stream, with reeds and rushes and other weeds growing in it. The Plaintiff asks for an injunction to restrain the Defendants from continuing that obstruction or diversion of the river in which he claims rights as a riparian proprietor. The Defendants attempt to justify what they have done under sect. 16 of the *Railways Clauses Act* of 1845. I will consider presently the terms of that section, but I think it only right and fair to confess that I have felt myself placed in this difficulty from the first, that, according to the best consideration I could give to the terms of the section, it seemed to me to justify the Defendants in what they have done; but there is very high authority expounding the section which appears to me at variance with the conclusion to which I should otherwise have come, and to be so strong a decision in favour of the Plaintiff's case that, unless I am free from that authority, I must decide in her favour. I have therefore to elect between my own view of the construction of the section, and the construction which was put on the very same part of it by the Court of Queen's Bench twelve years ago. [His Lordship then read sect. 16.] According to my view of the construction of the section, the words "as they may think proper" are words of great importance, and give a very wide and large discretion to the company as to the mode in which they may carry their works into effect, and I think that the works which are comprised in the last sub-section, viz., "all other acts necessary for making, maintaining, altering, or repairing and using the railway," stand upon a different footing from those acts in respect of which it is expressly declared that they may be done as the railway company think proper.

Supposing the works which are declared to be in the discretion of the company to be works which are reasonable for the purpose of constructing the railway, and the discretion of the company to be exercised *bonâ fide*, then, according to the view which I take of the section, the works may be done by the company. In executing the works they must of course do as little damage as they reasonably can, and for the damage which they cannot help doing they must compensate by a money payment.

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(1) Law Rep. 7 H. L. 697.

The question then would arise whether the Defendants are not carrying the stream by the side of their railway in a manner which they may reasonably think proper for the purpose of constructing the railway. It appears that the Defendants are under the necessity of obtaining earth for the purpose of constructing an embankment for their railway, and that they have obtained that earth from the channel or goit, and that, consequently, the river can flow through the channel or goit which has been so made by the removal of the earth; and it is said that they can execute their works very much more cheaply than they could if they were bound to take the earth from somewhere else, and to make two bridges over the river, one at either extremity of the diversion. It seems to me that there has been no want of good faith in their so doing. Therefore, if the point was untouched by authority, I should come to the conclusion that they are authorized to do what they are intending to do. But then comes this serious consideration, that the Court of Queen's Bench, sitting in banco twelve years ago, determined, in *Reg* v. *Wycombe Railway Company* (1), a case upon the construction of the very same words in the very same section of the Act. They had to consider the case of a diversion, not of a river, but of a road, the word "roads" following immediately after the words "rivers or streams of water" in the portion of the section which I have read. In respect of a road, therefore, there was a power to divert it in order to carry it by the side of the railway, as the company might think proper. In that case there was a road which was crossed, or might have been crossed, by a railway almost in exactly the same way as this stream might have been crossed by the present railway. There was a diversion of the road along the side of the railway almost exactly like the diversion of the stream along the side of the railway in the present case. There was nothing whatever to shew *mala fides* in the exercise of the discretion of the company, and yet the Court of Queen's Bench unanimously put this construction on the section, that it was not within the power of the company to make the diversion, unless the work was necessary for the making of the railway. They came to that conclusion, as it appears to me, for two reasons. They read the words in the introductory part of the section, which actually give the power "for the purpose of constructing the railway," as meaning "so far as it is necessary for the purpose of constructing the railway," and they then had regard to the last sub-section, which enables the company to do "all other acts necessary" for the purposes mentioned, and they said that that expression shews that the acts previously mentioned must also be necessary acts; that instead of works which may be proper being spoken of in contrast to works which are necessary, the word "necessary" is to be inferred as a condition to the doing of all the previously mentioned acts. That that is the effect of the decision in *Reg.* v. *Wycombe Railway Company* (1) has not been disputed. The Lord Chief Justice there refers to sect. 16, and, after having read the words "as they may think proper," he says (2): "I think the Legislature could never have intended to invest a company with powers so large, so unlimited, and so entirely discretionary, to interfere with either public or private rights, therefore I am not surprised that both at the beginning and at the end of the section the language plainly shews that the Legislature intended to limit the power by some qualification." He then cites the introductory words and the words of the last sub-section, and then he says (3): "Now the interpretation that I put on the whole section is, that the powers conferred on a railway company for the construction of their railroad are confined to matters which are not only done in the construction of the railway, but which are necessary to its construction." And observations to the same effect were made very emphatically by Mr. Justice *Lush*. The passages which I have read shew what appears to me to have been the second ground of the decision of the Court of Queen's Bench, viz., that the powers with which the

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(1) Law Rep. 2 Q. B. 310.

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(1) Law Rep. 2 Q. B. 310.
(2) Law Rep. 2 Q. B. 319.
(3) Law Rep. 2 Q. B. 320.

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section appears to invest railway companies are of so formidable a description that the Court was bound, if it found no express limitation put on them, to imply a limitation, and accordingly it put the limitation which it thought necessary. That case, as I have already observed, has been before the Courts for twelve years, and it has been prominently adopted by the present Master of the Rolls in *Fenwick* v. *East London Railway Company* (1). No doubt the question which was then before him arose mainly, if not entirely, on the last sub-section of sect. 16, and the main purpose for which the authority of *Reg.* v. *Wycombe Railway Company* (2) was used was to shew what is the meaning of the word "necessary" in that sub-section. But the Master of the Rolls went further, and he quoted this passage from the judgment of Mr. Justice *Lush* (3): "Having power to divert or alter they have the choice of doing it, either by carrying it over, or under, or by the side of the railway, but that is only conditional on its being necessary to do it for the purpose of constructing the railway. There is not a word in the section intimating that they have this power merely in order that they may construct the railway more economically or save expense to the company." Then the Master of the Rolls himself made this observation (4): "I think the case is concluded by the authorities (I should have thought it would have been by good sense without authority) that you cannot damage your neighbour's property merely for the purpose of saving yourself a little money where it is unnecessary for the construction of the railway." He therefore adopts the view that the things which the company may do are all things which are necessary for the construction of the railway.

It is easier and better for me to follow those authorities, though at variance with my own view as to the true construction of the section, than to attempt to act on my own view. The inconvenience to the public at large of Courts of co-ordinate jurisdiction varying from one another upon questions of public importance of this description in the construction of sections in Acts of Parliament which apply to every railway company, and to an infinite number of companies and other bodies taking land, would be so great that I think it better to follow an authority of such weight, adopted as it has been by the Master of the Rolls, and unimpeached as it is by any subsequent case, than to set up my own notion of the construction of the section against it. In saying that it is unimpeached, I do not forget that it has been pressed on me that the case of *Attorney-General* v. *Ely, &c., Railway Company* (1) is contrary to it. I do not, however, come to that conclusion. The necessity or the non-necessity of the work was not in controversy in that case, and the view of the Lord Chancellor was that a diversion of the road, vertically or horizontally, was necessary, and that all the railway company had to do was *bonâ fide* to elect which of those two diversions should be made.

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(1) Law Rep. 20 Eq. 544.

(2) Ibid. 2 Q. B. 310.

(3) Law Rep. 2 Q. B. 325.

(4) Ibid. 20 Eq. 551.

Having adopted the construction that the company can only do that which is necessary, I have next to inquire whether this diversion of the stream is or is not necessary within the meaning of the word as it is used in sect. 16. And here again those two authorities, *Reg.* v. *Wycombe Railway Company* (2) and *Fenwick* v. *East London Railway Company* (3), both shew that that is not necessary which is only cheaper. The mere fact that it will be a saving of money to the company is not enough to make it necessary within the meaning of sect. 16. That is emphatically the view which is expressed in both those cases, and there again I think it right and desirable to follow them.

Having regard to that principle it appears to me that the diversion of the stream which has been effected in the present case is not necessary for the purpose of constructing the railway. It is said that my decision will press with very great hardship on the company, because the stream is crossed by the railway no less than fifty-seven times, and it is said that they will be unable in fact to make their railway if the construction which I have put on the section should prevail. With that, however, I have nothing to do. If the company have misunderstood the meaning of sect. 16, if they have not acquired power to raise sufficient capital, that is their concern, not the concern of the Plaintiff. I cannot preclude her from the rights which she would have because in other cases bridges may be required, or may

(1) Law Rep. 4 Ch. 194.

(2) Law Rep. 2 Q. B. 310.

(3) Law Rep. 20 Eq. 544.

not be insisted on by the parties who might do so. I think, therefore, that the necessity for the diversion has not been made out, and that I must declare the Plaintiff to be entitled to the rights of a riparian proprietor.

I shall declare that the Plaintiff is entitled to the enjoyment of the River *Dore*, and to the water flowing in the same, as such river and water have been accustomed, before the interference therewith by the embankments constructed by the Defendants, to flow between the portions of the Plaintiff's farm purchased by the Defendants, subject to any ordinary and reasonable use of such river and water by the Defendants or other the riparian owners higher up the stream. Then I shall grant an injunction in terms corresponding to the declaration. The Defendants must pay the costs of the action.

North, Q.C., asked that the operation of the injunction might be suspended for six months.

FRY, J., ordered this to be done.

Solicitor for Plaintiff: *I. H. Wrentmore*, agent for *C. F. & G. James, Merthyr Tydvil.*

Solicitors for Defendants: *Roberts & Barlow*, agents for *James & Bodenham, Hereford.*

FRY, J.
1879
July 4.

In re WEST OF ENGLAND BANK.
Ex parte HATCHER.

Company—Shares held by Wife before Marriage—Liability of Husband—Married Women's Property Act, 1874—*Companies Act*, 1862, s. 78.

A woman, being entitled absolutely to shares in a company, married in May, 1878, and before the marriage the shares were settled for her own benefit. Upon the winding-up of the company:—

Held, that the liability of the husband to contribute to the assets of the company was not limited by the *Married Women's Property Act*, 1874, to the interest acquired in right of his wife, but that he was liable as a contributory in his own right under the 78th section of the *Companies Act*, 1862.

THIS was an adjourned summons in the winding-up of the *West of England Bank* upon an application by *William Hatcher* to obtain the removal of his name from the list of contributories "as a member or contributory in his own right."

On the 6th of May, 1878, *W. Hatcher* intermarried with Mrs. *Ellen E. Parry*, who was possessed of property in her own right consisting of twenty-six shares of £20 each in the *West of England Bank*, and two houses situate in *London*, the whole of which property was, by a settlement before the marriage, assigned to a trustee upon trust for the separate use of Mrs. *Hatcher* for life, with a power of appointment to be exercised by Mrs. *Hatcher* solely, and after her death upon such trusts as she should by deed or will appoint. This deed, though it operated as a transfer of the shares in the bank held by Mrs. *Hatcher*, was never registered, and the bank had no formal notice of it; but when the June dividends of the year 1878 became payable, Mrs. *Hatcher* informed the manager of the bank in conversation that she had been married, and that upon the marriage a settlement was executed under which she was entitled to the dividends for her separate use. Upon this the money was paid to her upon the joint signatures of herself and her husband. The shares continued on the register of the bank up to the time of the stoppage in the name of *Ann E. Parry*, with a memorandum against the entry that the certificate of the marriage had been produced to the manager. The bank was wound up in December, 1878, and the names of both Mr. and Mrs. *Hatcher* were placed on the list of contributories, Mr. *Hatcher* being entered "as a member or contributory in his own right."

Ingle Joyce, for *W. Hatcher* :—

The liability of Mr. *Hatcher* to contribute to the debts of the company is governed by the *Married Women's Property Act Amendment Act*, 1874 (37 & 38 Vict. c. 50), which repealed the Act of 1870 so far as it declared that the husband should not be liable for the debts of his wife contracted before marriage. The 1st section of that Act, however, limits the extent of the husband's liability by providing that the husband and wife may be jointly sued for any such debt, and the 2nd section enacts that the liability shall extend only to the assets specified in the 5th section. These shares were never vested in the husband, but were assigned to a trustee for the wife absolutely. The husband has never had any power over them, or interest in them. He cannot be made liable for any property of his wife which has never come into his possession, and which he could not reduce into possession. This was not a debt contracted before marriage. When a company is wound up, every member is liable to contribute towards the payment of the debts, but the liability is not a debt due to the company, and it does not arise until the winding-up. That was explained by the Master of the Rolls in *In re Whitehouse* (1). This gentleman should be placed upon the list of contributories only in right of his wife, and not in his own right.

Glasse, Q.C., and *Romer*, for the official liquidator:—

The *Companies Act*, 1862, s. 78, distinctly enacts that upon the marriage of a female contributory her husband shall during the marriage be liable to contribute the same sum as she would have been liable to contribute if she had not married. It never could have been intended by the *Married Women's Property Act*, 1874, to abrogate that clause of the Act of 1862. The liability to contribute is by the 75th section of that Act made a specialty debt capable of being proved against the estate of the debtor. We say that the husband is liable in his own right, and must be so placed on the list.

Ingle Joyce, in reply.

FRY, J.:—

The question which I have now to decide is one, no doubt, of some novelty, and also of some difficulty. It appears that in this case Mrs. *Parry* was absolutely entitled to twenty-six shares in this bank, and that on the 6th of May, 1878, she married Mr. *Hatcher*, having previously executed a settlement of these shares. It would appear that that settlement was never registered and did not come in any way to the knowledge of the bank; but the marriage must have come to their knowledge, for this reason, that the dividend having been drawn out in favour of Miss *Ann Ellen Parry*, it was paid on the joint receipt of *William Hatcher* and *Ann Ellen Hatcher*, which could not have happened except from the marriage of those two persons. Now the name of Mr. *Hatcher* together with that of his wife has been placed on the list of contributories, and he has been entered as a member or contributory in his own right. That is objected to, and it is said that he ought to be entered as a contributory only to the extent to which a husband is liable for debts of his wife contracted before marriage under the *Married Women's Property Act* of 1874. The 1st section provides that a husband and wife married after the passing of the Act, which is the case here, may be jointly sued for any debt of the wife contracted before marriage. The 75th section of the *Companies Act*, 1862, provides that " the liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced ;" and it is said, and I think with justice, that that debt must be deemed to have been contracted at the time when the wife became a shareholder in this company, and therefore before the marriage. Consequently it is argued that the husband is liable only to be sued jointly under the *Married Women's Property Act*, 1874, and that he is only liable to the extent of the assets mentioned in the 5th section of that statute. I think that argument ought not to prevail, and for this reason, that in my judgment the liability to contribute in the case of winding-up is a statutory liability having very peculiar incidents of its own, and the object and nature of it is to be learnt from the Act itself, namely, the Act of 1862. Now the 78th section of that statute provides that " if any female contributory marries either before or after she has been placed on the list of contributories her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly." The husband, therefore, is himself a contributory. Now the 75th section says in the words that I have already read that the liability to contribute shall be deemed to create a debt accruing due from such person at the time when his liability commenced. Applying those words to the husband, his liability clearly commenced when he married; and therefore he is to be deemed to owe a debt the accruing due of which commenced from the time of his marriage. He is therefore in the position of a debtor, and not merely the husband of a debtor. He is a contributory himself, and not merely the husband of a contributory, and that liability to contribute which is made equal to a debt of his own cannot be affected by the Act of 1874, which only deals with the husband's liability in respect of his wife's debts. Therefore it does not touch the husband's own liability to contribute. For that reason, I think this contention ought not to succeed, and that the proper mode of entering Mr. *Hatcher's* name on the list of contributories is as a contributory under the 78th section of the Act of 1862. The question, however, is a fair one for discussion, and it appears to be quite a new point, and therefore I think the costs of both sides ought to come out of the estate.

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(1) 9 Ch. D. 595, 599.

Solicitors for the Applicant: *Gregory, Rowcliffes, & Rawle.*
Solicitors for the Bank: *Clarke, Woodcock, & Ryland.*

FRY, J.
1879
July 4.

In re WEST OF ENGLAND BANK.
Ex parte BUDDEN AND ROBERTS.

Winding-up—Contributories—Bankrupts and their Trustees—Disclaimer.

In the winding-up of a company a shareholder who has become bankrupt cannot be placed on the list of present contributories, neither can his trustee in a bankruptcy, whether prior or subsequent to the winding-up, be on the list if he shall have executed a disclaimer under the *Bankruptcy Act*, 1869, s. 23.

THIS was an adjourned summons on the application of the official liquidator of the *West of England Bank* to place the name of *Elizabeth Ann Budden* on the list of contributories, or the name of her trustee in bankruptcy; and, further, that the name of *John Roberts* might be placed on the list, or the name of his trustee under a liquidation petition.

E. A. Budden, who was a shareholder in the bank, had become bankrupt before the winding-up of the bank, and *J. Roberts* had gone into liquidation after the winding-up, but before any call had been made. Both the trustee in bankruptcy and the trustee in the liquidation had executed disclaimers, under the 23rd section of the *Bankruptcy Act*, 1869, after the winding-up.

Glasse, Q.C., and *Romer*, for the official liquidator:—

We submit that *Budden* and *Roberts* should both be placed on the list of contributories, or, in the alternative, that their trustees should be on the list. The 77th section of the *Companies Act*, 1862, provides that if any contributory shall become bankrupt, either before or after he has been placed on the list, his assignees shall be deemed to represent him for all purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate any moneys due from him to the assets of the company. It is true that these trustees have disclaimed under the 23rd section of the *Bankruptcy Act*, but this does not prevent their being kept on the list of contributories, in order that the amount due from the bankrupt may be proved against their estate. If neither the bankrupt nor his assignee is on the list, all identification will be lost, and it will be impossible to obtain information or facilities for proof against the estate in respect of any calls that may be made.

Everitt, for the representatives of Mrs. *Budden*.

Chapman Barber, for the trustee in the bankruptcy of Mrs. *Budden*.

Higgins, Q.C., and *Daw*, for the trustee in the liquidation of *J. Roberts*.

FRY, J.:—

I do not think I can possibly put these persons on the list. It appears to me the 23rd section of the *Bankruptcy Act* of 1869 is very explicit. It says that where a trustee disclaims shares, the shares shall be deemed to be forfeited at the date of the order of adjudication.

To take the first of the two cases before me, the adjudication was on the 21st of July, 1873; and if those shares had been forfeited on that date, it is clear I could not put the past holder of

FRY, J.
1879
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those shares on the list of contributories in a winding-up which takes place on the 20th of December, 1878, in any other character than as a past member, which is not now in controversy.

It appears to me that the trustee who represents the estate of *Elizabeth Budden* cannot be a contributory, but the official liquidator will have a right of proof for what injuries he sustains by reason of the effect of the 23rd section.

The other case is somewhat different. In that case the shareholder, Mr. *Roberts*, went into liquidation after the winding-up, and therefore the disclaimer of his trustee relates to a date subsequent to the winding-up, and shares are only to be deemed forfeited as from the latter date. If a call had been made in the interval between the winding-up and the liquidation of *Roberts*, I should have thought the trustee of *Roberts* ought to be on the list of contributories in respect of that call; but as it appears that no such call was made in that interval of time, I think it would be useless to put him on the list of contributories, and that all that can be done is to prove in his liquidation in respect of the injury sustained by the effect of the 23rd section, which causes his shares to be treated as if they were forfeited at the date of the liquidation.

Glasse, Q.C.:—Probably your Lordship will not think it wrong to insert in the order some direction to your Chief Clerk that in striking their names out, it is to be without prejudice to our right of proof against the general estates of the two bankrupts.

Fry, J.:—It is better he should keep a list of shares which are deemed to have been forfeited.

Both parties will have their costs.

Solicitors: *Clarke, Woodcock, & Ryland*; *Saxton & Morgan*; *Pilgrim & Phillips*; *Coode & Co.*

In re AIRD'S ESTATE.
AIRD *v.* QUICK.

[1877 A. 19.]

FRY, J.
1879
July 5.

Will—Erroneous Recital—Advance—Account.

A testator, by his will, gave a legacy, and by a codicil, after reciting that he had advanced to the legatee a certain sum, he directed that sum to be considered as a payment on account of the legacy:—

22 Ch D
499

Held, that the sum mentioned would be deducted from the legacy, though the advance in fact made was less than that sum.

JOHN AIRD, by his will, gave the residue of his estate in trust for such of his children as should be living at the time of his death, and the issue then living of such of them as should be then dead, with power to the trustees to pay either the capital of the shares to his sons respectively, or to apply the income for the benefit of such sons or their wives or children respectively. The testator made a codicil to his will containing the following words:—

"Whereas by my said will I have directed that the shares in my residuary estate coming to each of my sons *William Aird*, *Joseph Aird*, and *Henry Keeble Aird* under the said will should be held by trustees for the benefit of such son, his wife, children, and statutory next of kin as therein mentioned, but subject to a proviso that the trustees may at their discretion transfer the whole or any part of the said share to such son. And whereas I have since the date of my will advanced £4000 to each of my said sons *William Aird*, *Joseph Aird*, and *Henry Keeble Aird*, now I direct that each of the said sums of £4000 or so much thereof as shall not have been repaid to me at the time of my death shall be considered as a payment or advance on account of the share in my residuary estate of the son to whom the same had been advanced, and shall be deducted from the amount which the trustees are to hold in trust for him and his wife, children, and statutory next of kin under my said will."

The testator made other codicils to his will which it is not necessary to state for the purpose of this report. He died on the 9th of April, 1876.

Not followed Re Taylor Tomlin v Underhill
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In re AIRD'S ESTATE.
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A suit was instituted for the administration of his estate. Some of the sons denied that the testator had, at the time when he made the codicil, advanced £4000 to them respectively. In the case of one of the sons, *William Aird*, the Chief Clerk had certified that *William Aird* admitted that the testator had, between the date of the will and the date of the first codicil, advanced to him £3152 and no more, and the Chief Clerk certified that no part of this had been repaid to the testator. The sons contended that their shares of residue were to be charged, not with £4000 each as mentioned in the codicil, but with only the sum actually advanced to them respectively; and the case of *William Aird* was argued.

Macnaghten, for the Plaintiff:—

It has always been taken for granted that a person deriving benefits under a will must be bound by the statements in the will; but the only case on the point to be found is *Quihampton* v. *Going* (1).

Higgins, Q.C. (*Everitt* with him), for *William Aird*:—

The testator merely made a mistake as to the sums he had advanced, and his intention plainly was that the share of each son should be charged with what had been actually advanced to him. A clear gift cannot be cut down by an erroneous recital: *Theobald* on Wills (2); *Whateley* v. *Spooner* (3). The question in *Quihampton* v. *Going* was merely whether entries in a ledger are part of a will.

J. Pearson, Q.C., and *Stirling*, for the trustees of the will.

FRY, J., after stating the terms of the will and reading the first codicil, continued:—

Taking the case of *William Aird*, which has been argued before me, it appears that £4000 had in fact not been advanced by the testator at the date of that codicil. The recital that £4000 had been advanced was therefore erroneous. The question then arises whether *William Aird* is bound by that recital, and whether the sum of £4000, or so much as should not have been repaid, shall be deemed to have been advanced on account of his share. In my judgment he is so bound. If he had been able to shew a repayment of any sums subsequently to the date of the codicil, of course that defence would have been admissible, but it is not contended that there has been any actual repayment of any of the advance made. It appears to me that in that codicil I have a direction that £4000, or so much of £4000 as is not repaid, shall be taken in reduction of the share. If the testator was in error in the view in which he was proceeding, it appears to me that the error is binding on those who benefit under his will.

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(1) 24 W. R. 917. W.N.(1876)109.
(2) Page 424.
(3) 3 K. & J. 542.

His Lordship then said that a similar observation occurred with regard to the second codicil as to an advance of £2162 13*s.* 8*d.* to another son; and expressed his opinion that a third somewhat similar codicil did not open the account or affect the question.

Solicitor for Plaintiffs: *J. A. Iles.*
Solicitors for *William Aird: Nickinson & Co.*
Solicitors for Trustees of the Will: *Murray, Hutchins, & Stirling.*
Solicitors for other parties: *Cope & Co.*

In re PARKER, DECEASED.
CASH *v.* PARKER.

FRY, J.
1879
July 10.

[1879 P. 161.]

Practice—Abatement of Action—Death of sole Defendant—Appointment of Interim Receiver—Rules of Court, 1875, *Order* L., *r.* 1.

In a creditor's action for administration against an executrix, a decree had been made and a summons taken out for a receiver; but pending the summons the sole Defendant died. The Court, on the application of the Plaintiff, appointed an interim receiver, whose powers were to extend for ten days after the appointment of an administrator *de bonis non*, the Plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator and to accept short notice of motion to discharge the receiver.

THIS was a creditor's action for the administration of the estate of *Thomas Parker*, lace manufacturer, who died largely indebted.

The Defendant was his widow and sole proving executrix. A decree had been made and a summons taken out for a receiver; but pending the summons the Defendant died.

Since her death it appeared that certain creditors and other persons had removed some lace machines and other effects forming part of the estate.

A creditor had applied for administration *de bonis non*, but some time would elapse before such grant could be made.

Russell Roberts, for the Plaintiff, now applied *ex parte* for an interim receiver.

He referred to Rules of Court, 1875, Order L., rule 1, and to *Roundell* v. *Currer* (1); *Jones* v. *Williams* (2); *Legard* v. *Hodges* (3), as shewing that such an order could be made notwithstanding that the action had become abated.

FRY, J.:—

I will, upon the authorities cited, appoint a receiver whose powers shall extend for ten days after the appointment of an administrator *de bonis non* to the estate, the Plaintiff undertaking to use all possible speed in obtaining the appointment of himself or some other person as such administrator and to accept short notice of motion to discharge the receiver.

Solicitors: *Torr & Co.*

(1) 6 Ves. 250.

(2) 1 Coop. C. P. 488.

(3) Reg. Min. 26 July, 1844, cited in Pemberton on Revivor, p. 18.

BERKELEY *v.* STANDARD DISCOUNT COMPANY.

FRY, J.
1879
July 8, 12.

[1877 B. 504.]

Practice—Discovery—Answer to Interrogatories—Member of Company—Costs—Rules of Court, 1875, *Order* XXXI., *rr.* 4, 6, 10.

A member of a company is entitled to refuse to file his affidavit in answer to interrogatories, delivered to him under rule 4 of Order XXXI. of the Rules of Court, 1875, until he has been paid his taxed costs of making it.

Reversed on appl 13 Ch D. 97. CA

ON the 8th of May, 1878, upon the application of the Plaintiff, an order was made by Vice-Chancellor *Malins* that the Plaintiff should be at liberty to deliver interrogatories for the examination of *J. C. Stirling*, a member of the Defendant company. *Stirling* had formerly been a director of the company, but had resigned that office in May, 1876, after which time he had not held any office therein, but was simply a shareholder. The interrogatories were delivered by the Plaintiff, and an affidavit in answer to them was prepared on behalf of *Stirling*, but he refused to file the affidavit until he had been paid his taxed costs of making it. The Plaintiff then took out a summons, asking that *Stirling* might be ordered to answer the interrogatories within four days after service of the order upon him, and that the costs of the application might be costs in the cause. The hearing of the summons was adjourned into Court.

Mulligan, for the Plaintiff:—

Rule 4 of Order XXXI. of the Rules of Court, 1875, under which the order was made, is taken from sect. 51 of the *Common Law Procedure Act*, 1854, with this difference, that the interrogatories may be delivered to a "member," as well as to an "officer," of the company. No case is to be found under sect. 51 in which it has been held that an officer of a company is entitled to his costs before answering. The member ought to apply to the company's solicitor for advice. An ordinary witness is not entitled to employ a solicitor or counsel to protect him. Rule 6 says that "interrogatories shall be answered by affidavit to be filed within ten days." That is unconditional, and rule 10 is equally unconditional. It says that "if any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by *vivâ voce* examination, as the Judge may direct."

[He referred to *Hall* v. *London and North Western Railway Company* (1); *Smith* v. *Great Western Railway Company* (2).]

Burton Buckley, for *Stirling*:—

Sect. 51 of the *Common Law Procedure Act*, 1854, and rule 4 of Order XXXI., are a substitute for the old practice of a bill of discovery in equity. In *Wilson* v. *Church* (3) the Master of the Rolls, referring to sect. 51, said: "It enabled the person requiring a right to discovery to get an order to examine the proper officer on interrogatories. Then, of course, the parties to the action paid all the costs of the proceedings, and the officer gave discovery, and had nothing further to do with the action." Under the old practice of the Court of Chancery the Defendant to a bill of discovery, as soon as he had put in a sufficient answer, was entitled to his costs from the Plaintiff. An ordinary witness in an action is entitled to refuse to be sworn till his expenses have been paid. When a person is summoned for examination under sect. 115 of the *Companies Act*, 1862, the practice is to pay his expenses, if they are demanded, before he is compelled to answer. A member of a company interrogated under rule 4 is really in the position of a witness. If he does not ask for his costs before filing his answer he will have no other opportunity of doing so. A person who is compelled to give discovery ought to be indemnified against costs by the person for whose benefit he gives it.

Mulligan, in reply:—

The Defendant to a bill of discovery had to answer before he could get his costs. A witness only gets expenses, not costs. And that is so in the case of a person summoned under the *Companies Act*.

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(1) 35 L. T. (N.S.) 848.

(2) 2 Jur. (N.S.) 668.

(3) 9 Ch. D. 552.

July 12. FRY, J.:—

The summons in this matter was taken out under the 10th rule of Order XXXI. The subject-matter of that order is discovery and inspection, and the 4th rule provides that "if any party to an action be a body corporate or a joint stock company . . . . any opposite party may apply at Chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation or company, and an order may be made accordingly."

In this case an order has been made, not upon an officer, but upon a member of a corporation to answer interrogatories. The member has declined to file his affidavit in answer to the interrogatories, unless his taxed costs be first paid him. Thereupon the Plaintiff applies, under rule 10, that I should require the member to answer without complying with the condition on which he insists. In my judgment I ought not so to do. I think that it is not reasonable that a member who may not be, and in this case is not, in any way interested in the governing body of the corporation, should be required at his own expense to answer the interrogatories of any Plaintiff in an action against the corporation who may obtain an order against him. I think that the analogy of a witness is strong to shew that the expense to which a person is put in giving what is really evidence in an action ought to be sustained by the person who calls upon him to give that evidence. It is said that the 6th rule imposes an absolute and unconditional obligation on every person to whom interrogatories are administered to answer them, because it provides that "interrogatories shall be answered by affidavit." I think the real meaning of that is only this, that when answered they shall be answered by affidavit, and not by a *vivâ voce* examination. Therefore it appears to me that there is nothing in the rules to preclude me from imposing what appears to me a perfectly reasonable condition on the power given by the 10th rule.

I reserved my judgment to enable me to make inquiry whether

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any practice had grown up in the Common Law Courts, under the *Common Law Procedure Act* of 1854, which gave a similar power of interrogating officers of corporations, or under the present rules since they have been in force. I have had an opportunity of conversing with one of the Judges of the Common Law Divisions on the subject, and I understand from him that, at any rate so far as he knows, no such practice has existed. The question therefore appears to be *res integra*. Under these circumstances, I shall make an order upon the member interrogated to answer the interrogatories upon the payment to him of his taxed costs of answering, and, as he has always been willing to do that, and the Plaintiff has come here to compel him to answer without receiving his taxed costs, I must order the Plaintiff to pay the member's costs of this summons.

Mulligan applied, under sect. 49 of the *Judicature Act*, 1873, for leave to appeal.

Fry, J., gave leave.

Solicitors for Plaintiff: *W. & J. Gibson.*
Solicitors for *Stirling: Linklater, Hackwood, & Co.*

FRY, J.
1879
July 15.

In re ELHAM VALLEY RAILWAY COMPANY.

DICKSON'S CASE.

Company—Winding-up—Contributory—Application to discharge Order made in Chambers—Limit of Time—Companies Act, 1862 (25 & 26 *Vict. c.* 89), s. 124.

19 Ch.D.330

As a general rule an application to discharge an order made in Chambers to place a person on the list of contributories of a company in liquidation ought to be made within the time (three weeks) which is limited by sect. 124 of the *Companies Act*, 1862, for bringing an appeal.

Ex parte Brown (1) and *Dickson* v. *Harrison* (2) followed.

An order to wind up the *Elham Valley Railway Company* was made on the 1st of August, 1874. The official liquidator claimed

(1) Law Rep. 9 Ch. 304.

(2) 9 Ch. D. 243.

to place the name of Major *Dickson* on the list of contributories for fifty shares. On the 19th of March, 1877, the matter was heard by Vice-Chancellor *Malins* in Chambers, and was argued on behalf of Major *Dickson* by his solicitor, and the Vice-Chancellor then directed the Chief Clerk to settle Major *Dickson's* name on the list for fifty shares. No order was made to adjourn the hearing of the summons into Court. Major *Dickson's* name was accordingly settled on the list, and the list was in July, 1878, brought in and approved by the Vice-Chancellor. Major *Dickson* took no steps to have his name removed. His solicitor deposed that it was believed that no larger call would be made than £1 or £2 per share, and Major *Dickson* preferred to pay such a call rather than engage in further litigation. On the 4th of March, 1879, however, a call of £9 per share was made, which was to be payable on the 30th of April, 1879. On the 17th of April, 1879, Major *Dickson* took out a summons, asking that his name might be struck off the list of contributories.

Burton Buckley, for the summons.

J. Pearson, Q.C., and *Crossley*, for the official liquidator, took the preliminary objection that the application was made too late.

Buckley:—Laches is of no importance with regard to a list of contributories; no one is misled, as in the case of a register of shareholders, into trusting the company: *Shewell's Case* (1); *Hart's Case* (2). There is always in the first instance a merely formal settlement of the list of contributories which is approved by the Judge.

[FRY, J.:—Here the case was argued.]

J. Pearson, Q.C., and *Crossley*, for the official liquidator:—

In *Shewell's Case* the contributory had been deceived by his solicitor; he thought that the proper steps had been taken to remove his name from the list, and did not find out till five years afterwards that it had been left on through the misconduct of his solicitor, and then he applied at once to have it removed. In the present case the applicant has known for two years that his name was on the list and has done nothing. He has been speculating on the probable amount of the call, and must be taken to have elected to remain on the list.

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(1) Law Rep. 2 Ch. 387, 389.

(2) Law Rep. 6 Eq. 512.

Moreover, this is really an application for a rehearing, and such an application ought to be made within the twenty-one days limited by sect. 124 for appealing.

[FRY, J., referred to *Ex parte Brown* (1); *Dickson* v. *Harrison* (2).]

Buckley, in reply:—

In both the cases which I cited the certificate of the list of contributories had been filed. The Court may adopt the limit of twenty-one days, by analogy to the limit fixed by sect. 124 for appeals, where there has been a final decision in Chambers. But in the present case there has not really been a judicial decision as yet.

FRY, J, :—

The preliminary objection has been taken that Major *Dickson* is too late in making this application, and in my judgment that objection ought to prevail.

In the first place, it is obvious that great inconvenience would be caused if summonses of this character, which are in effect summonses to discharge a part of an order previously made by the Judge, were allowed to be made at any time whatever. It is quite true that no call had been previously made, and that in that sense the creditors of the company would not be injured by my now removing the name of Major *Dickson* from the list. But of course, if Major *Dickson* can make this application, every other contributory can make a similar one, and the result would be that, after the lapse of a year from the settlement of the list, the official liquidator would really have no means of calculating the call which he ought to make and the manner in which he ought to proceed in the winding-up. The inconvenience of such delay is a thing against which, in my view, the Court ought to guard.

But, further than that, I think the analogy of sect. 124 of the Act of 1862 affords an argument in the same direction. That section provides that no rehearing or appeal from any order or decision made or given in the matter of the winding-up of a company shall be heard unless notice of the same is given within three weeks after the order complained of has been made, subject however to a discretionary power in the Court to enlarge the time for that particular rehearing.

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(1) Law Rep. 9 Ch. 304.

(2) 9 Ch. D. 243.

It is quite true that in point of expression that section does not provide for the hearing of applications to discharge either in whole or in part any order made in the course of a winding-up. But I think that I ought to apply by analogy the limit of time there fixed expressly with regard to appeals and rehearings to applications to discharge orders, and in so doing I shall be following precedents of great weight.

In *Ex parte Brown* (1), where a rehearing before the same Judge was not within the express terms of Rule 143 of the Bankruptcy Rules of 1870, which limits the time for an appeal, the Court of Appeal thought that by analogy the same limit of time ought to be applied, subject of course to the discretion of the Judge to enlarge the time. And in *Dickson* v. *Harrison* (2) the Court, having before it an application under sect. 50 of the *Judicature Act*, 1873, to discharge an order made in Chambers, thought that the reasonable thing was to apply the twenty-one days' rule which exists with regard to appeals. In the same way I think I ought to follow the analogy of sect. 124 of the Act of 1862, and to hold that an application of this sort ought to be made within three weeks from the time when the judicial decision was given.

In my view the matter was judicially decided by the Vice-Chancellor so long ago as the 19th of March, 1877. I hold that I have a discretionary power to enlarge the time, but then arises the question whether there are any circumstances which ought to induce me to exercise that discretion.

I have heard the affidavits read, and, so far from inducing me to allow a rehearing, they influence my mind in exactly the opposite direction. Major *Dickson* undoubtedly was aware that he was placed on the list as long ago as March, 1877, but he chose to speculate on the chance of a call not being heavy, and he did not think there was sufficient probability of a heavy call to induce him to incur the certain expense which he would have incurred if he had moved to have his name taken off the list, and it is not until a heavier call than he expected is made that he applies to have his name taken off. That perhaps is a very ordinary course of conduct, but it is not such a course of conduct as to induce the Court to accede to his application.

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(1) Law Rep. 9 Ch. 304.

(2) 9 Ch. D. 243.

On these grounds therefore I allow the objection, and dismiss the summons with costs.

Solicitors for Applicant: *Harries, Wilkinson, & Raikes.*
Solicitors for Liquidators: *Bowlings, Foyer, & Hordern.*

In re WIRTH'S PATENT.

L. C.
1879
July 30.

Petition to seal Patent—Communication from Abroad—Declaration—True and First Inventor.

Upon the hearing of a petition that the Great Seal may be affixed to letters patent, the Lord Chancellor will not give effect to an objection going to a matter of form, such as an objection to the jurat of a declaration.

W. was an alien resident abroad. He acted as the agent of *M. & Co.*, and applied for letters patent in *England* for an invention of the latter. He made the usual statutory declaration, which was filed with his petition. In it *W.* was described as an alien resident abroad, and it was declared before H.B.M. consul at *Frankfort*:—

Objection founded on these facts overruled.

Letters patent may be granted to an alien resident abroad for an invention communicated to him by another alien also resident abroad.

THIS was the hearing of the petition of *Frank Wirth*, of *Frankfort*, that the seal might be affixed to letters patent granted to him for an invention of "Improvements in colouring matters and in the manufacture of the same, communicated to him by *Meister, Lucius, & Brünning*, of *Höchst, Germany*." The petition had been rendered necessary by a *caveat* lodged on behalf of Dr. *J. P. Griess*, the patentee of an invention alleged to be similar.

The opponent had not opposed before the law officer.

The objections filed by the opponent were: 1. That *F. Wirth* was not the true and first inventor or importer of the alleged invention; and 2. That the opponent had reason to believe that the alleged invention was in whole or in part similar to the invention for which the opponent had already obtained certain specified letters patent. By his affidavit in opposition he had also objected that *Wirth* had not made, and could not make, at *Frankfort* a declaration that would be good under British patent or other law.

Upon the petition being called on,

Aston, Q.C. (*Chadwyck Healey* with him), for the opponent, urged as a preliminary objection that the application of *Wirth* for letters patent was void *ab initio*, on the ground that a declaration such as that required by the 6th section of the *Patent Law Amendment Act*,

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In re WIRTH'S PATENT.

1852, and the rules thereunder, could not be made by a foreigner resident abroad before the British Consul. He contended that the forms required by the Act must be presumed to have been required for particular reasons, and that such provisions were not merely directory. Moreover, *Wirth*, being a foreigner resident abroad, could not receive particulars of an invention from another foreigner and then obtain British letters patent, as for an invention imported into *Great Britain* within the meaning of the Act.

Webster, Q.C. (*Lawson* with him), for the Petitioner, objected that the preliminary objection was not covered by the filed objections.

Chadwyck Healey cited *Ex parte O'Reily* (1), as an authority that the Lord Chancellor was not precluded from entertaining further objections than those specified.

CAIRNS, L.C.:—

It is not necessary to decide that point. I cannot admit upon an application to seal letters patent an objection to the form of a jurat. That is a matter for the Patent Office solely, as a matter of procedure. The rest of the preliminary objection is covered by the first of the objections filed by the opponent, and I am of opinion that it cannot be sustained. I am quite clear that letters patent may be granted to a foreigner resident abroad for an invention communicated to him by another foreigner also resident abroad.

The petition was then opened, and heard upon the merits.

Ultimately it was arranged that the letters patent of the Petitioner should be sealed, he undertaking to insert in his specification a disclaimer of any invention covered by the patents of the opponent.

No order was made as to costs.

Solicitors for Petitioner: *Faithfull & Owen.*
Solicitor for Opponent: *J. Henry Johnson.*

(1) 1 Ves. 112.

PHEYSEY *v.* PHEYSEY.

C. A.
1879

[1877 P. 95.]

Practice—Appeal—Interlocutory Order—Time for appealing—Enlargement of Time—Order on Summons in Administration Suit against an Execution Creditor—Rules of Court, 1875, *Order* LVIII., *r.* 15—*Memorandum of the* 10*th of November,* 1875.

After an action had been brought for the administration of a testator's estate the executrix carried on the testator's trade with his assets, and incurred a trade debt for which the creditor brought an action and obtained judgment and execution, under which he seized some of the testator's assets. The sheriff interpleaded, and the proceeds of the sale were paid into Court in the administration action. The creditor took out a summons in the administration action claiming the proceeds of the sale, but his claim was refused:—

Held, that the order, although finally determining the rights of the parties, was an interlocutory order under Rules of Court, 1875, Order LVIII., rule 15, and that an appeal must be brought within twenty-one days. Enlargement of time refused.

The Memorandum as to Practice of the 10th of November, 1875 (1), explained.

IN this case an action was brought against *Sarah Pheysey* and others for the administration of the estate of *Henry Pheysey.* The testator was a wine merchant trading under the name of *Henry Pheysey & Co.*, and his widow and executrix *Sarah Pheysey* continued to carry on his business under the same name after his death.

On the 8th of August, 1877, an order was made in the administration suit for the sale of the business to *John Arnold,* and for payment of the debts due to the business into Court.

In the meantime a trade creditor named *A. A. Tartas* brought an action in the Exchequer Division against *Sarah Pheysey* on a dishonoured bill of exchange for £91 15*s.* accepted by her in the course of the business, and applied under Rules of Court, 1875, Order XIV., rule 1, for judgment against her. On the 7th of September, 1877, *Tartas* obtained judgment against *Sarah Pheysey* for the debt and costs, with immediate execution. Execution was forthwith issued, and the sheriff seized some of the goods of *Henry*

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(1) 1 Ch. D. 41.

Pheysey & Co. The sheriff interpleaded, and after some intermediate proceedings an order was made in November, 1877, in the administration action that the proceeds of the sale should be paid into Court in that suit. *Tartas* then took out a summons for payment of the money to him in part satisfaction of his judgment debt. This application was refused by Vice-Chancellor *Hall* on the 26th of July, 1878.

On the 12th of December, 1878, *Tartas* gave notice of appeal from the order refusing his application.

Beaumont, for the Appellant.

Warmington, for the Plaintiffs in *Pheysey* v. *Pheysey*, took the preliminary objection that the order was an interlocutory order, and therefore the appeal was too late: *White* v. *Witt* (1); *Cummins* v. *Heron* (2).

Beaumont, for the Appellant:—

Every order made on summons is not an interlocutory order; that is clear from the Memorandum of the 10th of November, 1875 (3), which makes a distinction between those finally determining the rights of parties and others. The order in the present case is not analogous to an order made between parties to a suit or those who come in under the decree for administration. The Appellant was entirely a stranger to the suit, and had obtained an execution under independent proceedings, and the proceeds, he says, belonged to him, but were taken possession of by the Court. If the Court should be against me on the point, I ask for an extension of the time. It is a question fairly open to doubt: *In re Baillie's Trusts* (4).

Dickinson, Q.C., and *J. G. Laing*, for the Defendants in the suit.

JAMES, L.J.:—

It appears to me that this was pre-eminently an interlocutory order. The order was made in a suit instituted for the purpose of dealing with the testator's estate, which must be cleared from all claims before the final order on further consideration can be made.

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(1) 5 Ch. D. 589.

(2) 4 Ch. D. 787.

(3) 1 Ch. D. 41.

(4) 4 Ch. D. 785.

If twelve months are allowed for appealing from every order on every claim upon the estate, such final order can never be made; it would tie up the estate for an indefinite time. That is precisely why the rule for limitation of time for appeal was made. There is no more hardship to this particular creditor than to any other creditor. He says that the money produced by this execution is his money. Whether he had any right to it was the question to be tried under the interpleader order in the action of *Tartas* v. *Pheysey*. Then came an order by Vice-Chancellor *Hall* in November, 1877, by which the matter was taken possession of by this branch of the Court; the interpleader order was got rid of; the fund was brought into the Chancery Division; and the right of the Appellant was reserved to come in and prove his claim in the administration suit. That order has not been appealed from. He was in the same position as every other creditor who claims to be paid out of the fund in Court. An order made under such circumstances determining his claim was pre-eminently an interlocutory order.

With respect to the Memorandum in November, 1875 (1), as to what orders could be heard by the Court of Appeal, it was not intended by that Memorandum to define what is an interlocutory order; but having regard to the importance of matters continually determined on interlocutory appeals it was thought, as a matter of judicial discretion, that it was right for three Judges to hear the appeals from orders finally determining the rights of parties, although, strictly speaking, they might have been heard by two only. But that distinction was made from a regard to the importance of the matters determined by such orders, and it was not intended to decide whether they were interlocutory orders or not.

With respect to the application for enlargement of time for appeal, we see no reason why any such indulgence should be granted.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors for Appellant: *Learoyd & Co.*
Solicitors for Respondents: *Curtis & Betts; Jerwood.*

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(1) 1 Ch. D. 41.

C. A.
1879
July 16.

Ex parte TUCKER. *In re* TUCKER.

Practice—Appeal—Extension of Time—Adjudication of Bankruptcy—"Person aggrieved"—Rules of Court, 1875, *Order* LVIII., *rr.* 9, 15—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 10, 71.

20 Ch D 141
22 Ch D 438
440
24 Ch D 492

A third person who is aggrieved by an adjudication of bankruptcy, by reason of the date of an act of bankruptcy on which the adjudication purports to be founded, is, after the expiration of the time limited for appealing, entitled, *ex debito justitiæ*, to an extension of the time for appealing, if he applies promptly after he becomes aware of the date of the act of bankruptcy which affects his rights.

THIS was an application by *G. Tucker* for leave (notwithstanding the expiration of the time limited by rules 9 and 15 of Order LVIII. of Rules of Court, 1875) to appeal against an adjudication of bankruptcy which was made on the 13th of January, 1879, against *W. Tucker*, a dairyman, so far as the adjudication purported to be founded on an act of bankruptcy committed by him on the 24th of September, 1878, and for leave to adduce new evidence.

The petition on which the adjudication was made alleged that *W. Tucker*, being a trader, did on the 24th of September, 1878, with intent to defeat or delay his creditors, depart from his dwelling-house or otherwise absent himself, and also that he did on the 15th of October, 1878, with intent to defeat or delay his creditors, depart out of *England*. The petition was presented on the 9th of November, 1878, and on the 10th of November *R. W. Giblett* was appointed receiver, and an interim injunction was granted restraining *G. Tucker*, who was the father of the debtor, from parting with or disposing of any moneys in his hands belonging to the debtor, and on the 19th of November the injunction was continued until further order. On the 13th of January, 1879, the adjudication was made, the order of adjudication stating that it was made upon proof satisfactory to the Court of the acts of bankruptcy alleged to have been committed by the debtor. The bankrupt did not appear on the hearing of the petition. On the 14th of February, 1879, *Giblett* was appointed trustee in the bankruptcy. On the 27th of January, 1879, *G. Tucker*, in answer to a letter which had been addressed to him by *Giblett* on the 18th of January,

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Ex parte
TUCKER.
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wrote to *Giblett:* "I beg to say that I have nothing whatever of my son's;" and in reply to this *Giblett,* on the 28th of January, wrote to *G. Tucker:* "I perceive what you say that you have not now any property belonging to your son. But I must give you distinctly to understand that everything that has passed through your hands, from the 24th of September, 1878, to the present time, will have to be accounted for by you." On the 23rd of May, 1878, *G. Tucker* was examined before Mr. Registrar *Murray* in pursuance of a summons issued by the trustee. On that occasion a discussion took place in his presence, between his counsel and the counsel of the trustee, as to the date of the first act of bankruptcy committed by the bankrupt, and the 24th of September was several times mentioned during the discussion. *G. Tucker* was examined and admitted that, on the 11th of October, 1878, a sum of £490 was paid by the bankrupt to the credit of his account with his bankers. He said that this payment was made in respect of a debt which the bankrupt owed him. On the 5th of July, 1879, the trustee gave notice to *G. Tucker* of his intention to apply to the Court on the 14th of July for an order declaring that the £490 was property belonging to the trustee, and that it formed part of the estate of the bankrupt, and that *G. Tucker* might be ordered to pay the £490 to the trustee. On the hearing of this motion *G. Tucker's* solicitor applied for an adjournment to enable him to appeal against the order of adjudication, which, according to *Ex parte Learoyd* (1), was, so long as it existed, conclusive against him that the act of bankruptcy alleged to have been committed on the 24th of September had been in fact then committed. An adjournment was accordingly granted, and on the 14th of July *G. Tucker,* by special leave of the Court of Appeal, served notice on the petitioning creditor and on the trustee of the present application for leave to appeal against the adjudication.

G. Tucker made an affidavit in which he denied that the alleged act of bankruptcy of the 24th of September had been committed, and said that he was not aware until the 11th of July of the allegation in the petition that it had been committed, when he was informed of the allegation by his solicitor. His solicitor also made an affidavit, in which he said that, at the time of the adjudication, he was aware that the bankrupt had on the 15th of October, 1878, gone to *America,* and he understood that the adjudication had been made upon that departure as an act of bankruptcy. He said that he for the first time became aware on the 5th of July, 1879, by means of a copy of the affidavit filed by the trustee in support of his application against *G. Tucker*, that the bankrupt was alleged to have committed another act of bankruptcy on the 24th of September, and that the order of adjudication referred to acts of bankruptcy in the plural, and that the trustee claimed to set aside the payment of the £490, on the ground that it was made after the earlier act of bankruptcy.

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(1) 10 Ch. D. 3.

De Gex, Q.C., and *Yate Lee,* for *G. Tucker* :—

The applicant is aggrieved by the adjudication, and is clearly entitled to the leave which he asks.

E. Cooper Willis, for the trustee and the petitioning creditor :—

The applicant has been guilty of unreasonable delay. The injunction was granted against him as long ago as November; and the letter of the 28th of January, and the proceedings before the Registrar on the 23rd of May, called his attention to the fact that the 24th of September was the material date. Yet he did not make the present application till the 14th of July.

JAMES, L.J. :—

I think that the applicant must have an opportunity of trying the question whether this act of bankruptcy was committed. Putting aside for the present the trustee's letter of the 28th of January, and the proceedings before the Registrar on the 23rd of May, how does the case stand? The applicant was called upon on the 5th of July to pay £490 to the trustee, on the ground that he had received that amount from the bankrupt after the commencement of the bankruptcy, and he then found that the order of adjudication was based upon an act of bankruptcy alleged to have been committed by the bankrupt on the 24th of September, *i.e.*, before he had received the money. This was the first time that he was called upon to take any legal steps in the matter, and he then found that, by virtue of sect. 10 of the *Bankruptcy Act,* he was estopped by the order of adjudication from denying that that act of bankruptcy had been committed. It seems to me that he was then in time to ask to be allowed to take steps to set the adjudication aside. So the matter would stand independently of any delay on the part of the applicant. But it is said that he is estopped by reason of the trustee's letter of the 28th of January. He may, however, well have thought that, if the trustee could prove that an act of bankruptcy had been committed on the 24th of September, he would be entitled to do so, and that the letter meant no more than that the trustee would attempt to prove that. That which took place on the 23rd of May does not, as it seems to me, carry the case any further. If the applicant had been then distinctly told that the order of adjudication was a judicial decision that an act of bankruptcy had been committed on the 24th of September, he might perhaps have been bound to act promptly if he wished to set the adjudication aside. But there is nothing to shew that he knew at that time that there had been any judicial decision on the point. I think, therefore, that he is entitled, *ex debito justitiæ*, to prove now, if he can do so, that such an act of bankruptcy never was committed, he being very seriously prejudiced if it was.

BRETT and COTTON, L.JJ., concurred.

It was then arranged that the order of adjudication should be varied, by omitting from it all reference to any act of bankruptcy but that of the 15th of October, without prejudice to any question. The trustee was then to be at liberty to give a fresh notice of motion before the Registrar for payment of the £490, so that evidence might be adduced on both sides with regard to the alleged act of bankruptcy of the 24th of September. The costs of the present application to be costs of the trustee's motion before the Registrar.

Solicitors for Applicant: *Bolton, Robbins, & Busk,* agents for *S. Hobbs,* junr., *Wells, Somerset.*

Solicitor for Trustee: *Edward George,* agent for *R. Clarkson & Henley, Calne.*

C. A.
1879
FRY, J.
April 4, 5.
C. A.
June 10.

In re KENT TRAMWAYS COMPANY.

Company—Winding-up—Preliminary Expenses—Costs of obtaining Special Act to be paid by Company—Work done by Clerk to Promoter.

The special Act of a tramway company provided that the costs of and incident to the preparing for, obtaining, and passing of the Act should be paid by the company:—

Held (affirming the decision of *Fry*, J.), that a person who had, as clerk to a promoter of the company, performed work in relation to the obtaining of the Act, but who had looked only to the promoters for his remuneration, could not prove in the winding-up of the company in respect of the work so performed by him.

THIS company was incorporated under an Act passed in August, 1873 (36 & 37 Vict. c. ccxxiv.), s. 69, provided that "All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company."

On the 19th of November, 1875, an order was made to wind up the company. *George Pike* carried in a claim in the winding-up for £239 11*s.* 4*d.*, "for work and labour done and materials for the same provided by me as a parliamentary agent in and about and incident to the preparing for, obtaining, and passing" the Act of 1873. The liquidator objected to the claim that the company had never entered into any agreement with *Pike* for his remuneration, and that *Pike* had acted as a clerk or servant to one *Gough*, a parliamentary agent, who was one of the promoters of the company. The Chief Clerk disallowed the claim. *Pike* took out a summons to vary the certificate. He stated in his affidavit that he had an office at which he carried on the business of a Parliamentary agent on his own account.

Terrell, for *Pike*.

Glasse, Q.C., and *Solomon*, for the liquidator.

Terrell, in reply.

FRY, J., after referring to sect. 69, and *Wyatt* v. *Metropolitan Board of Works* (1):—

That Act is entirely silent as to the persons by whom the work has been performed in respect of which the costs referred to have been incurred. The work may have been done by a promoter, in the hope of payment by the company when constituted, or it may have been done, in pursuance of a contract with the promoter, by a person who has looked only to the promoter for payment. In either of those cases I think that the promoter is the only person who is entitled under the Act to recover payment from the company. There may be other intermediate cases with which I am not now concerned. Under which of the two classes which I have mentioned does the present case properly fall? It appears to me that *Pike* was employed by *Gough* to do the work in respect of which he makes this claim, and that he was to look to *Gough* only for his remuneration. [His Lordship referred to the evidence on this point.] I hold that the only person who in such a case is entitled under sect. 69 to recover against the company is the promoter. I therefore refuse the summons with costs.

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(1) 11 C. B. (N.S.) 744.

C. A.

From this decision *Pike* appealed. The appeal was heard on the 10th of June, 1879.

Terrell, for the Appellant:—

The Appellant was himself a parliamentary agent, and although he was employed by *Gough*, so that he was justified in including what he had done in *Gough's* bill of costs, he had also a right to charge the company for them independently of *Gough*. The 69th section of the Act is quite wide enough to include these charges; and as the company have had the benefit of *Pike's* services it is just that they should pay for them.

Glasse, Q.C., and *Solomon*, for the liquidator, were not called on.

JESSEL, M.R.:—

In this case, whether *Pike* was in law in the employment of *Gough* as a clerk or otherwise, or is to be treated as an independent person, is, to my mind, utterly immaterial. If he is to be looked upon in the latter character, he still placed himself in the position of one who gave credit to *Gough* and looked for payment to him. For all purposes he must be considered as bound by the

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In re KENT TRAMWAYS COMPANY.

acts of *Gough*, and he could not be paid if *Gough* could not. There is no pretence for saying that the Act conferred any new right on a person who had placed himself in such a position. The appeal must be dismissed with costs.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitor for Appellant: *T. E. Watkin.*
Solicitors for Liquidator: *Shea & Bevan.*

C. A.
1879
C. J. B.
March 10, 17.
C. A.
June 19.

Ex parte GAMES. *In re* BAMFORD.

Fraudulent Deed—Assignment of Whole Property, Present and Future, in Consideration of Past Debt and Future Advances—License to seize—Statute 13 *Eliz. c.* 5—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6.

A bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage to secure an existing debt and future advances, is not necessarily void under the statute 13 Eliz. c. 5.

It will only be void if it is not made *bonâ fide*, *i.e.*, if it is a mere cloak for retaining a benefit to the grantor.

Nor, if the time be past within which the execution of the deed is an act of bankruptcy available for adjudication against the grantor, or within which the deed can be set aside as a fraudulent preference, can it be treated as void under the bankruptcy law.

Decision of *Bacon*, C.J., reversed.

ON the 27th of November, 1874, *Samuel Bamford*, a farmer, executed a bill of sale to *William Games* to secure a then existing debt of £249 and future advances. The deed contained an assignment of "all and every the household goods and furniture, stock-in-trade, plate and plated articles, household linen, books, china, and other household effects whatsoever, horses, saddles, harness, and other accoutrements, and also all the implements of husbandry, crops of corn and grain, and live and dead stock, lease or agreement for a lease of *Cilwhibart Farm*" (then occupied by *Bamford*) "and all interest in the said lease and farm which the said *Samuel Bamford* now hath or may hereafter have, and also all other goods, chattels, and effects now being or which shall hereafter be in, upon, or about the messuage or dwelling-house now occupied by the said *Samuel Bamford*, and all and every the book and other debts, sum and sums of money due and owing to the said *Samuel Bamford* from any person or persons whomsoever, and all other the personal estate whatsoever of or to which the said *Samuel Bamford* is now and from time to time and at all times hereafter (so long as any moneys shall remain due and payable to the said *William Games*, his executors, administrators, or assigns, by virtue of these presents) shall be possessed or entitled."

There was a proviso that the deed should become void if the principal money secured thereby should be paid on demand in writing by the mortgagee, and interest should be paid in the meantime, and there was this further clause:—

" And it is hereby agreed and declared that after default shall be made by the said *Samuel Bamford*, his executors, administrators, or assigns, in payment of the said sum of £249 and other moneys (if any) and interest, or any part thereof respectively, contrary to the tenor and effect of the before-mentioned proviso, then and in such case it shall be lawful for the said *William Games*, his executors, administrators, or assigns, to recover and receive all and every the debts, moneys, and premises hereby assigned, and also peaceably and quietly to receive and take into his or their own possession, and thenceforth to hold and enjoy all and every other the premises hereby assigned, and also to seize and take possession of any household goods and furniture, stock-in-trade, and other goods, chattels, and effects which shall or may from time to time be substituted in lieu of the said household goods and furniture, stock-in-trade, goods, chattels, and effects, or any part thereof, or which shall for the time being be found in or about the messuage or dwelling-house and premises now in the occupation of the said *Samuel Bamford*, or which may at any time hereafter during the continuance of this present security be in the occupation of the said *Samuel Bamford*, either in the lifetime or after the decease of the said *Samuel Bamford*;" and to sell the property and retain out of the proceeds of sale what should be due to the mortgagee, and account for the surplus (if any) to the mortgagor. Until default the mortgagor was to remain in possession. There was also a proviso that the total principal moneys

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1879

Ex parte GAMES.
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to be secured by or ultimately recoverable by virtue of the deed should not exceed £300. The deed was registered as a bill of sale.

After its execution *Games* advanced to *Bamford* other sums of money exceeding £300, and £300 and interest were at the date next mentioned due on the security.

On the 31st of October, 1878, the landlord distrained for rent, and on the 4th of November a demand in writing was made by *Games* for the money secured by the bill of sale. The money not being paid, possession was taken on behalf of *Games* on the 5th of November, 1878, of the furniture and other effects in *Bamford's* house, and of the farming and other stock upon his farm; and a sale was advertised for the 19th of December.

The property thus seized included various articles which had been substituted for those of which *Bamford* was possessed at the time when the deed was executed. On the 14th of December, 1878, *Bamford* filed a liquidation petition in the *Merthyr Tydfil* County Court. Immediately after the petition was filed a receiver was appointed, and an injunction was granted restraining the sale of the property until after the first meeting of the creditors under the petition. The trustee afterwards applied to the Court to make the injunction perpetual. The Judge was of opinion that so much of the property seized by *Games* as had been acquired by *Bamford* since the date of the deed did not pass by it, but belonged to the trustee. And His Honour made an order declaring that the trustee was entitled to all the goods, chattels, and effects of *Bamford* acquired by him after the 27th of November, 1874, and restrained *Games* from selling or seizing the live or dead stock, goods, chattels, and effects of *Bamford* acquired since the 27th of November, 1874. *Games* appealed to the Chief Judge. The appeal was heard on the 10th and 17th of March, 1879.

E. Cooper Willis, and *Maclean*, for the Appellant:—

Under the covenant that after default it should be lawful for the assignee to seize and take possession of after-acquired property, all the property of the assignor on the farm at the date of taking possession belonged to the assignee, on the principle of *Holroyd* v. *Marshall* (1).

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(1) 10 H. L. C. 191. 9 Jur N.S. 213

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It is not open to the trustee to contend that the deed is void as an act of bankruptcy. After a lapse of four years it is too late to raise any such contention: *Allen* v. *Bonnett* (1); *Robson* on Bankruptcy (2). All that can be now said against the deed is, that it is void under the 13 Eliz. c. 5. But it has been repeatedly held that a deed whereby a man assigns even all his property in favour of one or more of his creditors is not necessarily void under the statute.

Upon this appeal we are in the situation described by Lord Justice *Giffard* in *Alton* v. *Harrison* (3), where he says: "It must be remembered that we are not now dealing with a case in bankruptcy . . . I have no hesitation in saying that it makes no difference in regard to the statute of *Elizabeth* whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of *Elizabeth*."

Winslow, Q.C., for the trustee:—

The deed is not only void under the statute of *Elizabeth*, but it is a very clear act of bankruptcy, though not now available for the purpose of adjudication.

This is the first instance in which the Court has been asked to adjudicate upon a deed which not only assigns all the goods "now being" on the farm, but which further goes on to give to the assignee a power to seize all the property of every description which the assignor may afterwards acquire. And for this *Holroyd* v. *Marshall* (4) is cited, which extended the equity of a mortgage security to machinery substituted for the machinery originally mortgaged. No doubt *Holroyd* v. *Marshall* is a binding authority; no doubt the effect of the covenant was to give to *Games* an equitable interest in the after-acquired property. But what is the effect of such an equitable assignment? Clearly its effect is to defeat and delay creditors: *Ex parte Bolland* (5).

In *Lomax* v. *Buxton* (6) a bill of sale was upheld, and Mr. Justice

(1) Law Rep. 5 Ch. 577.

(2) Page 121.

(3) Law Rep. 4 Ch. 622, 626.

(4) 10 H. L. C. 191. 9 Jur. N.S. 213.

(5) Law Rep. 17 Eq. 115.

(6) Ibid. 6 C. P. 107.

Willes, in giving reasons for supporting it, observed that it was unlike the deed which was held invalid in *Graham* v. *Chapman* ~~(1)~~, 2 inasmuch as it did not contain a power to seize all after-acquired property. "No power," he said ~~(2)~~, "is given to seize after-acquired (1) farming stock, which it would appear was a by no means unimportant exception." The inference is, that the Court would have held such a deed as this to be invalid.

It has been argued that the case is not a bankruptcy case. Even if it is not, the deed is fraudulent under the statute of *Elizabeth*: *Spencer* v. *Slater* (3). But it is also an act of bankruptcy. Deeds of this kind have been sustained on the principle that where a debtor, parting with property, gets an equivalent for it, creditors have a security upon that equivalent; but where both the property and the equivalent are alike charged, the deed cannot be supported. The money-lender has overreached himself.

Willis, in reply:—

The only question is whether the statute of *Elizabeth* applies. No attempt has been made to take advantage of the deed as an act of bankruptcy. We ourselves made further advances on the faith of it. It has been argued that the deed, from the frame of it, falls necessarily within the statute of *Elizabeth*. But that is not the legal doctrine: *May* on Fraudulent Alienations (4); *Wood* v. *Dixie* (5); *Alton* v. *Harrison* (6).

[BACON, C.J.:—Does the statute or the policy of the law give a trustee in bankruptcy a different or other remedy than that which it gives to any other creditor?]

Willis:—We say it does not; and so the question is reduced to this—Can any creditor set this deed aside as being fraudulent under the statute? Can all the creditors together do so? We submit they cannot. If the money was advanced on the faith of this arrangement the deed will prevail: *Ex parte Izard* (7). We have the decision of the County Court Judge as to present property. Can the security be good in part, and bad as to the rest?

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(1) Law Rep. 6 C. P. 114.
(2) 12 C. B. 85.
(3) 4 Q. B. D. 13.
(4) Page 84.
(5) 7 Q. B. 892.
(6) Law Rep. 4 Ch. 622.
(7) Law Rep. 9 Ch. 271.

BACON, C.J. :—

The argument has been very extensive, and a great many points have been discussed, which do not, as it appears to me, arise in the case.

The real question is, whether the policy of the law as recited in the statute of *Elizabeth*, and as declared by the law of bankruptcy, will say that such an agreement as this can be honestly made—whether it will not say that such an agreement is within the mischief which it was the object and purpose of the statute of *Elizabeth* to prevent. That a man may assign his own property to a favoured creditor, there can be no doubt. He has as much right to make over his stock and other effects to any creditor he pleases, as he has to sell his horse or his watch, or to do anything else in the way of dealing with that property of which he is master. But then any assignment of property made with the intent or for the purpose of delaying or defeating the other creditors is against the law. Was this an assignment made with the intent or for the purpose of delaying or defeating the debtor's other creditors. Is it competent for a man in the position of this debtor to say, "I owe this creditor, Mr. *Games*, £250, and I mean to defeat every other creditor I have in the world. I may become bankrupt, but nevertheless I will make such an assignment to this one creditor as will have the effect of defeating and delaying every other creditor that I have." Is there any other meaning to be placed upon the transaction than this? Then default is made, possession is taken, and then comes the liquidation petition. Upon that the bill of sale holder comes and says, "I am entitled to seize not only what the debtor assigned to me at the date of the bill of sale, but what he has since acquired;" and *Holroyd* v. *Marshall* (1) is referred to as deciding that upon possession being taken the mortgagee is entitled to enforce this covenant against the after-acquired property. How could he do that without filing a bill or bringing an action? He could not enforce the covenant in any other way. Such an agreement is clearly within the statute of *Elizabeth*. It is impossible to say that it is not within the mischief of the statute that a man should be able to put all his property present and

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(1) 10 H. L. C. 191. 9 Jur. N.S. 213.

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future into such a position as that no creditor, except the one mentioned in the mortgage deed, shall have any right to it.

The case of *Alton* v. *Harrison* (1) has really nothing to do with the question. In that case a man mortgaged his own property to pay certain creditors what he owed them. There was no question there of bankruptcy—no question of the statute of *Elizabeth.* The learned Judges treated the transaction as a mortgage by a man of certain property over which he had undisputed control, to secure an existing debt. Nothing that fell from the learned Judges in that case (Vice-Chancellor *Stuart* and Lord Justice *Giffard*) will be found to support the contention that whatever a man possesses, and whatever he shall hereafter possess, can lawfully be assigned over for the benefit of one creditor to the exclusion of the rest. The cases justify no such proposition.

The question then comes to this, Is this deed an instrument which can be supported within the policy of the law? In my judgment it is not within the policy of the law. In my opinion it does come within the description of an assignment made with intent to defeat and delay creditors.

It is clear that the crops which were on the ground at the time of the bill of sale must be reaped and sold, and this must go on from year to year. Thus the security as to them will be at an end, and the doctrine of *Holroyd* v. *Marshall* (2) can have no application. The right of the creditor is restricted to the property of which the debtor was possessed at the time; and as there is no ground for disturbing the conclusion which was arrived at by the Court below, the appeal must be dismissed with costs.

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From this decision *Games* appealed. The appeal was heard on the 19th of June, 1879.

E. Cooper Willis, and *Maclean,* for the Appellant :—

The point raised before the Chief Judge was not raised in the County Court. There is no evidence that any present creditor of the bankrupt was a creditor at the date of the deed. If the deed was an act of bankruptcy when it was executed it was not available for adjudication after the expiration of six months: *Bankruptcy Act*, 1869, s. 6; and the creditors could not after that set it aside under the bankruptcy law: *Allen* v. *Bonnett* (1). And, under the statute 13 Eliz. c. 5, such a deed is valid even if executed on the eve of bankruptcy, provided that a sufficient consideration was originally given.

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(1) Law Rep. 4 Ch. 622.

(2) 10 H. L. C. 191.

[JAMES, L.J.:—But for the bankruptcy law a debtor may make a voluntary payment of the whole of his property to one creditor. Under this deed the grantee could not acquire a right to any debts afterwards becoming due to the grantor. He could not take possession of them; he must give notice in some way to the persons from whom they were due.]

The power to seize given by the deed is in substance a power to seize the chattels which might be substituted for those which existed at the date of the deed. Such a power is valid, and when it is put in force the grantee acquires a legal title to the chattels which he seizes. He has a good equitable title by force of the assignment: *Holroyd* v. *Marshall* (2). We are only claiming substituted chattels. Such a power is necessary where there is property of a fluctuating nature. The deed is not bad in itself, and there is no evidence of actual fraud.

Winslow, Q.C. (*Bigham*, with him), for the trustee:—

The question is, whether a man who is carrying on business can be allowed to assign all his property, present and future, to one creditor, so that if he afterwards purchases any goods they will at once pass to the grantee. Such a deed must be fraudulent as against every creditor with whom the grantor contracts a new debt which he can have no means of paying.

[JAMES, L.J.:—The equity of redemption still remains to the grantor.]

That makes no difference when there is an attempt to defeat and delay creditors. Such a deed as this necessarily tends to defeat and delay creditors, and a man must be taken to contemplate the necessary consequences of his acts: *Freeman* v. *Pope* (3).

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(1) Law Rep. 5 Ch. 577, 581.

(2) 10 H. L. C. 191. 9 Jur N.S. 213.

(3) Law Rep. 5 Ch. 538.

[JAMES, L.J.:—Has a *bonâ fide* conveyance to a creditor for a real debt ever been held to be void under the statute of *Elizabeth?*]

Twyne's Case (1) was a conveyance to a creditor.

[JAMES, L.J.:—There the deed was held to be void because the grantor's remaining in possession was a badge of fraud.]

But *Twyne's Case* shews that the fact that the deed is made in favour of a creditor is not *per se* enough to make it a good deed. A very similar point was considered by the Chief Judge in *Ex parte Bolland* (2). *Graham* v. *Chapman* (3) shews that such a deed would be void as an act of bankruptcy, because it must defeat and delay the creditors of the grantor. If it defeats and delays every creditor he can ever have, it must be void under the statute of *Elizabeth*: *Spencer* v. *Slater* (4). There it was said that creditors whose debts were under £50 were necessarily defeated and delayed by the deed because they could not treat it as an act of bankruptcy, and they were without remedy if the deed was good. The rights of subsequent creditors are shewn by *Holmes* v. *Penney* (5).

[JAMES, L.J., referred to *Spirett* v. *Willows* (6).]

This is an *à fortiori* case. With regard to acts of bankruptcy it has been held that an assignment of all the grantor's property in consideration of a past debt equally delays creditors whether it is absolute or only by way of mortgage. The same principle must apply to the statute of *Elizabeth*, the words of which are substantially the same as those of the *Bankruptcy Act*. This deed is a continuous assignment of all the grantor's goods as they come into existence, without any fresh advance by the grantee, and power is given to seize all that is assigned. If such a deed is upheld, most serious frauds may be committed on creditors.

JAMES, L.J.:—

I am unable to agree with the view taken by the Chief Judge, which was not that of the County Court Judge. I do not see any circumstances in the present case which can justify us in yielding to Mr. *Winslow's* exhortations to follow the example of our predecessors, Lord *Mansfield* and other Judges, in applying the principle of previous decisions to a new state of facts. Here there was a debt of £249 *bonâ fide* due from the mortgagor to the mortgagee, and the mortgagee afterwards made further advances to the mortgagor. The security was limited to £300, and the mortgagee took the property only by way of security. If the equity of redemption is really valuable, I cannot see that there has been any fraud on the other creditors. The mortgagor had a right to sell all his property and pay this particular creditor, and he had an equal right to give him all his existing property as security for the debt. If an act of bankruptcy was committed by the execution of the deed, it was published to all the world by the registration under the *Bills of Sale Act*, and any creditor could have availed himself of it to make the mortgagor a bankrupt. I cannot see that there was any intention to defeat or delay the creditors. The mortgagor was intended to remain in possession of the property and to carry on his business, substituting new chattels for those which he sold in the course of his business, and the security of the mortgagee was to remain upon the substituted chattels. He got the substituted chattels in place of those which he allowed to be withdrawn by the mortgagor. I cannot see any fraud in that. Of course the deed could not of itself prevent the mortgagor from employing any moneys which he received in paying his creditors. It appears to me that the deed was nothing more nor less than a preference of this particular creditor, and it was made more than a year before the bankruptcy. I see no evidence of any fraud upon the creditors.

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(1) 3 Rep. 80 b.
(2) Law Rep. 17 Eq. 115.
(3) 12 C. B. 85.
(4) 4 Q. B. D. 13.
(5) 3 K. & J. 90. 3 Jur N.S.
(6) 3 D. J. & S. 2[illegible]3. 11 Jur

BAGGALLAY, L.J.:—

I am of the same opinion.

THESIGER, L.J.:—

I am of the same opinion. There are two points. The one was raised before the County Court Judge, the other before the Chief Judge. The point which was raised before the County Court Judge was given up before the Chief Judge, and it has been, and indeed must have been, given up now, because the case falls within *Holroyd*

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v. *Marshall* (1), inasmuch as the property was seized by the mortgagee before the bankruptcy. With regard to the other point, I will assume with Mr. *Winslow* that the execution of the deed was an act of bankruptcy, and might have been set aside as an act of bankruptcy if any creditor had availed himself of it in sufficient time. But no creditor did avail himself of it, and the time for doing so has passed by. What, then, is the position of things under the bankruptcy law? It appears to me that no consequence whatever can follow from an act of bankruptcy of which the creditors might have availed themselves if they had applied in time, but of which they did not avail themselves as an act of bankruptcy within the time limited by the *Bankruptcy Act.* This point was really decided by Lord Justice *Giffard* in *Allen* v. *Bonnett* (2), where he said (3): "It appears to me to follow from this section [sect. 88 of the Bankruptcy Act of 1849] that where there is a deed which cannot be set aside under the statute of *Elizabeth,* or generally as fraudulent—including in the term a fraudulent preference—but solely and only as being an act of bankruptcy, the lapse of twelve months before any fiat issues validates that which would otherwise be impeachable; and that, if a given transaction of this description cannot be treated as a ground for adjudication, it cannot be treated as having the consequences of an act of bankruptcy in any sense or for any purpose." The only remaining point is whether the deed, not being available as an act of bankruptcy for any purpose, is void under the statute of *Elizabeth.* We may, I think, put aside for this purpose the fact that it is an assignment of the whole of the grantor's property, present and future. For in *Alton* v. *Harrison* (4) the same Lord Justice said (5): "I have no hesitation in saying that it makes no difference in regard to the statute of *Elizabeth* whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of *Elizabeth.*" Applying those remarks to the present case, and taking the question to be, what it plainly must be, was the deed *bonâ fide,* or was it a mere cloak for retaining a benefit to the grantor, what

(1) 10 H. L. C. 191.
(2) Law Rep. 5 Ch. 577.
(3) Law Rep. 5 Ch. 582.
(4) Ibid. 4 Ch. 622.
(5) Law Rep. 4 Ch. 626.

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are the facts? Undoubtedly there was good consideration given for the deed; though it was not good under the bankruptcy law, it was perfectly good under the statute of *Elizabeth*. The consideration was a pre-existing debt and further advances, which together appear to amount to nearly the value of the property. I can see nothing in the deed itself, or in the facts or the nature of the transaction, to shew that it was not a perfectly valid transaction, without any intent to defeat or delay the grantor's creditors.

The appeal was allowed, with costs in both Courts.

Solicitor for Appellant: *I. H. Wrentmore*, agent for *C. F. & G. James, Merthyr Tydfil.*

Solicitors for Trustee: *Bell, Brodrick, & Gray*, agents for *Lewis & Jones, Merthyr Tydfil.*

In re SIR JOHN MOORE GOLD MINING COMPANY.

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June 10, 18.

Voluntary Winding-up—Removal of Liquidator by the Court—Companies Act, 1862, s. 141—"Due Cause shewn."

The jurisdiction of the Court to remove a liquidator under sect. 141 of the *Companies Act*, 1862, for "due cause shewn" is not to be exercised in the same way as if the power had been for the Court to remove the liquidator "if the Court shall think fit." Some unfitness in the liquidator must be shewn in order to justify his removal, and the removing him is not a matter of pure judicial discretion.

The secretary of a company was appointed liquidator under a voluntary winding-up. He paid the debts and completed the winding-up, except that a small sum remained in his hands for division among the contributories. A contributory took proceedings to make the liquidator and two of the directors liable for sums for which he alleged them to have made themselves accountable before the winding-up. The liquidator was intimate with the two directors, had refused to take proceedings against one of them, and expressed a decided view in favour of their conduct in the matters complained of. The Court was of opinion that a *primâ facie* case, which called for an answer, was made out against the liquidator and also against the two directors:—

Held, by *Bacon*, V.C., and by the Court of Appeal, that the case was one in which due cause was shewn for removing the liquidator.

THIS was an application to remove Mr. *Dicker* from being liquidator of the *Sir John Moore Gold Mining Company*.

This company was registered as a limited company on the 5th of September, 1873, for working certain mines in *Australia*. *Thomas Dicker* was one of the promoters, and was appointed by the articles the first secretary of the company.

On the 5th of January, 1876, an extraordinary resolution was passed for winding up the company, and Major-General *Orr*, one of the directors, who was then in *Australia*, and *Dicker* were appointed liquidators. General *Orr* subsequently died.

In June, 1877, Mr. *Schlotel*, a contributory, presented a petition asking that the company might be wound up under the supervision of the Court. This petition was opposed by a great majority of the contributories, and was dismissed on the 14th of July, 1877.

The voluntary liquidation accordingly continued, *Dicker* acting as liquidator. The debts were paid, and very little remained to be done, *Dicker* stating that he had about £600 in hand for division among the contributories.

On the 12th of February, 1878, *Schlotel* took out a summons asking that the Court, under the *Companies Act*, 1862, s. 138, would, under sect. 141, or any other enabling section, remove *Dicker* from being liquidator, and appoint some other proper person in his place.

The case alleged was that *Dicker*, and *Barclay* and *Mackenzie*, two of the directors, had obtained the transfer to them of a number of vendors' fully paid-up shares in the company under such circumstances that they were liable to account to the company for the value, and that *Dicker* opposed all attempts made by *Schlotel* to have the matter investigated, and had refused to produce for his inspection documents throwing light on the case until compelled by an order of the Court to produce them. The summons ultimately came on to be disposed of by Vice-Chancellor *Bacon* on the 6th of February, 1879.

Kay, Q.C., and *Grosvenor Woods*, for the summons:—

A case is made which ought to be investigated. Mr. *Dicker* has a personal interest in opposing the investigation, and puts every hindrance in Mr. *Schlotel's* way. He ought, therefore, to be removed from his office.

Hemming, Q.C., and *Pugh*, for *Dicker* :—

There is no doubt about the jurisdiction of the Court to remove Mr. *Dicker*, but the power is a discretionary one: *In re Marseilles Extension Railway and Land Company* (1); *In re British Nation Life Assurance Association* (2). No sufficient case is made out for the interference of the Court: *In re Devonshire Silkstone Coal Company* (before Vice-Chancellor *Malins*, March 13, 1878, and before the Court of Appeal, July 8, 1878).

Sir *H. Jackson*, Q.C., and *Kenyon C. S. Parker*, for nearly all the shareholders:—

We oppose the summons. The Court has never exercised this jurisdiction against the wishes of the great bulk of shareholders except in cases of fraud.

Horton Smith, Q.C., and *Caldecott*, for the company, also opposed.

Bacon, V.C. :—

The single question I have to decide is whether Mr. *Dicker*, the present liquidator, should be continued as liquidator of this company. If sufficient cause is shewn by Mr. *Schlotel*, the present applicant, why Mr. *Dicker* should not be liquidator, he will be removed, and that may be done without the slightest stigma on him, and without pronouncing the slightest decision on the case of the applicant.

Now, what is the case? It is the commonest thing in the world. Mr. *Schlotel* says, "I have a cause of action and desire to prosecute it. An investigation is necessary. In the course of making that investigation I am impeded by the fact that Mr. *Dicker* has been appointed liquidator. He has upon every occasion done his best to frustrate me in carrying my proceedings to an issue." This statement of Mr. *Schlotel* is the only thing I have to consider. And that Mr. *Dicker* has done his best to prevent Mr. *Schlotel* from prosecuting his claim is clearly in evidence, and is not contradicted even by Mr. *Dicker* himself. Mr. *Hemming* says it was not worth Mr. *Dicker's* while to answer an affidavit containing information

(1) Law Rep. 4 Eq. 692.

(2) Law Rep. 14 Eq. 492.

derived nobody knows where and not to be looked at in the way of proof. That is quite true, but the charge against Mr. *Dicker* with which I have at present to deal is, not that he obtained shares fraudulently—with that I have nothing whatever to do now—but that he, being liquidator of the company, being bound to hold an even hand and to be impartial towards every shareholder in the company, has acted with great partiality to the disadvantage of Mr. *Schlotel*, who is prosecuting his claim. Then the fact that Mr. *Dicker* has been examined and would not sign his depositions is not disputed. The fact that when the order for inspection which Mr. *Schlotel* had previously obtained was executed in point of time, the liquidator, whose duty it was to give all possible information to members of the company, put him to the trouble and expense of getting another order, is not disputed. Then it is said that *Schlotel* had a partial inspection of as much as he wanted; and he is accused of having made a fishing inspection. All that I cannot attend to; but the fact remains that he desired to have this inspection, which was necessary to enable him to establish his case if he has one, and was prevented by the conduct which the liquidator has thought fit to pursue. The solicitor says that when he was consulted by Mr. *Dicker*, his advice to him was that he should keep himself loose from the directors and give all the information that was required of him. That was the advice he received, and it was advice which any sensible solicitor would give. Mr. *Dicker* was at that time the agent and secretary of the company, and he has since become the liquidator of the company—the man in whose knowledge all the information which Mr. *Schlotel* can possibly desire to have must repose—the man in whose possession every document that can be necessary to establish Mr. *Schlotel's* case is. I desire it to be particularly understood that no one word which falls from me says anything or expresses anything in favour of the claim which Mr. *Schlotel* makes, or prejudices in any degree Mr. *Dicker* as far as he has any personal interest in the matter; but as far as his public duty, for it may be called a public duty, is concerned, it remains to be performed. I find that he has neglected that duty, and neglected it to the prejudice of this applicant, and I think it therefore right that he should be removed. It is not a case in which I can attend to what has been said about Mr. *Barclay.* Mr. *Barclay's* case is not before me. If Mr. *Schlotel's* case is right he has a right to prosecute his claim in spite of all the other shareholders. If he fails it is at his own risk and cost, and he must bear all the expenses that have been incurred. The company, least of all, can have anything to say; they should be the persons most ready to insist on the most searching investigation. If any malpractices have existed—as to whether they have or not I express no shadow of opinion—it is right in the interests of the company, and of all the shareholders in the company, that they should be redressed. The applicant, Mr. *Schlotel,* has a right to prosecute his case, which may utterly fail nevertheless, but he has a right to prosecute it, and he is entitled to be protected against the partiality and interference and opposition of Mr. *Dicker.* I express no opinion against Mr. *Dicker,* but I think it right in the interests of justice that he should be removed from the office of liquidator, which he at present holds. The funds of the company will not suffer anything from this order. There may be a postponement of the division of the small sum of £600 or £800, but that is an inconvenience which from the nature of the proceeding cannot be prevented. No injury will be done to the shareholders in respect of which they should ask me to withhold an order which, in my opinion, in the interests of public justice should be made.

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Dicker appealed. The appeal came on for hearing on the 10th of June.

Pugh, for the Appellant:—

Mr. *Dicker* is not to be removed from his office because mere allegations are made against him the time for trying the truth of which has not arrived, and of which there is no evidence that can be acted upon. When he is brought before the Court properly on an application to make him liable for what he is alleged to have improperly received he will be ready to meet the case. The great body of contributories are opposed to these proceedings. *Dicker's* refusal to proceed against *Barclay* and *Mackenzie* was right when he was advised that any such proceedings would be fruitless. The applicant has had inspection of all books and papers in Mr.

Dicker's possession, and cannot complain that he has been obstructed. The liquidator ought not to be removed under sect. 141 of the *Companies Act* unless "due cause" is shewn. There must be some unfitness proved: it is not a mere matter of discretion. The view of Vice-Chancellor *Malins* in the case of *In re British Nation Life Assurance Association* (1) strikes out of the Act the words "for due cause shewn." Moreover, the Court in a matter of this nature will have regard to the wishes of the great body of contributories.

Sir *H. Jackson*, Q.C., and *Kenyon C. S. Parker*, for contributories.

Horton Smith, Q.C., for the company.

Kay, Q.C., and *Grosvenor Woods*, in support of the order:—

Mr. *Dicker*, according to his own shewing, has hardly anything left to do in the winding-up. He is personally interested in preventing the investigation of the case sought to be made out by Mr. *Schlotel*, and is closely connected with other parties whom it is sought to make responsible. Under these circumstances it is not expedient that he should be allowed to remain liquidator. Moreover, the Court will not readily interfere with the discretion of the Court below in such a matter.

Jessel, M.R.:—

This is an appeal from an order of Vice-Chancellor *Bacon* removing a liquidator. That the Court has power to review such an order is clear. I do not mean to throw any doubt upon the general rule that where a matter is within the judicial discretion of a Judge of first instance the Court of Appeal will only reverse his decision where very strong grounds for so doing are shewn, but the wording of the enactments applicable to the present case is such that the matter does not appear to be one of pure judicial discretion.

Now, what is the meaning of the words "on due cause shewn" in the *Companies Act*, 1862, s. 141? I am not prepared altogether to adopt the view of Vice-Chancellor *Malins* in the case of *In re British Nation Life Assurance Association*. The words must have some meaning, but it is difficult to define the extent to which they distinguish a case from one in which the ordinary words "if the Court shall think fit" are used. I should say that, as a general rule, they point to some unfitness of the person—it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up—some unfitness in a wide sense of the term. Here the company appointed its former secretary to be liquidator; he proceeded to wind up the affairs of the company; he paid the debts and most of the costs, and according to his view there is nothing left for him to do but to divide a very small sum. But Mr. *Schlotel* takes another view, and considers that a large sum is to be obtained by compelling certain persons standing in a fiduciary relation to the company to pay moneys for which he says they are liable—these persons being two of the directors and the secretary and liquidator himself. The principal person thus sought to be made liable is a former director, Mr. *Barclay*. He is not here, and I say nothing that can prejudice his case; all I say is that there is enough in the affidavit, to call on him for an answer. There is also a case made against *Dicker* himself, which, unless he can answer the affidavits satisfactorily, is a serious one. A summons was taken out to enforce that claim, and I say nothing more about it than that the claim is a serious one, about which there may be a *bonâ fide* litigation. It further appears that *Dicker* was one of the promoters, and has taken and still takes a strong view as to the conduct of the other persons whose conduct is impugned by Mr. *Schlotel*. He was intimate with them, to some extent jointly interested with them, and not likely to be ready to take a view adverse to them. He says in paragraph 8 of his affidavit, "I personally and through my solicitors inquired into the connection of *J. H. Barclay*, deceased, with the said company, and having ascertained, as I verily believe, all the facts, and acting upon the advice of counsel thereon, I determined to take no proceedings with reference thereto, being advised and verily believing that there was no ground for any such proceedings, and that any such proceedings would be unsuccessful." There is nothing to be objected to in that, but in paragraph 29 he goes on to say, "I further say that from inquiries I have made and the opportunities I had of observing what passed, I am satisfied and verily believe that the said General *Orr* and *J. H. Barclay* acted throughout in the greatest good faith and with a view only to the interests of the shareholders." That is strong testimony in their favour, but it is also a proof that he takes their side very strongly. That being so, Mr. *Dicker* having expressed a strong view against the applicant, having himself an interest adverse to the application, and having according to his own view nothing of importance left to be done in the liquidation, I think that his continuing in the office of liquidator can have no other effect than to impede *Schlotel's* proceedings. Everybody knows the difference which it makes in the conduct of such proceedings to have a liquidator who is hostile to them and disposed to put obstacles in the way. It seems to me that the case is one in which Mr. *Dicker* ought not to be continued as liquidator.

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(1) Law Rep. 14 Eq. 492.

BAGGALLAY, L.J. :—

I am of the same opinion, and have nothing to add.

THESIGER, L.J. :—

I am of the same opinion, and will only add that in my opinion due cause has been shewn for removing Mr. *Dicker*, and that, whatever be the meaning of the words "on due cause shewn" in sect. 141, they cannot mean that it is to be a pure matter of judicial discretion whether a liquidator is to be removed or not. I make this observation because in several cases in this Court it has been held that where the Judge of first instance has a discretion this Court will not interfere with its exercise unless it is manifest that it has been wrongly exercised. Here it seems to me that a liquidator has a right to say in this Court, as well as in the Court of first instance, that he is not to be removed unless due cause is shewn; and if an order has been made by the Court below to remove him, such order can only be sustained on the ground that this Court is satisfied that due cause for his removal has been shewn. Here I think that sufficient cause has been shewn, because the case is one in which Mr. *Dicker's* interests may conflict with his duty. Even if no claim had been made against him personally, his intimate connection with and his favourable disposition towards *Barclay*, against whom the principal

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claim is made, make it improper that he should be continued as liquidator. I am, therefore, of opinion that, apart from any impropriety in his conduct, sufficient cause has been shewn for removing him.

Solicitors: *Bell, Greenfield, & Abbott; John W. Sykes.*

In re PARES.
LILLINGSTON *v.* PARES.

[1878 L. 253.]

C. A.
1879
July 12.

Lunatic—Power of Court to bar Lunatic's Estate Tail—Sale under Partition Act—16 & 17 *Vict. c.* 70, *s.* 124—39 & 40 *Vict. c.* 17, *s.* 6.

The Court, under its Lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail; but it is the duty of the Court so to exercise it as not to affect the rights of the persons entitled in remainder to the estate.

Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for the partition of the estate, the Court, under the 6th section of the *Partition Act*, 1868, authorized the committee of the lunatic to request a sale and to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale.

THIS was a petition by the committee of the estate of *Mary Tylston Pares* (a lunatic) asking for the authority of the Court to request a sale of certain hereditaments, of an undivided share of which the lunatic was tenant in tail, in an action for a partition of the estate.

Mary Tylston Pares was tenant in tail in possession (subject to a jointure rent-charge of £500 and a charge of £5000 for portions) of three undivided fourth parts of an estate in *Leicestershire* called the *Narborough* estate, under the will of *Thomas Pares.*

On the 16th of May, 1874, a suit was instituted in the Court of Chancery, to which *Mary Tylston Pares* was a defendant, for the purpose of raising the said portions of £5000, with interest and costs, by sale or mortgage of the estate, and a decree for the execution of a mortgage was made. After the date of the decree *Mary Tylston Pares* was found to be a lunatic by inquisition, and

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on the 19th of February, 1876, an order was made in the lunacy on the petition of her committee, that a mortgage should be made of the three fourth shares of the lunatic for the purpose of raising three fourth parts of the total amount to be raised, and that such mortgage should be made for a term of years, so that the equity of redemption should be reserved to the person or persons entitled to such shares under the settlement made by the said will, and that such mortgage should not contain a power of sale (1).

A mortgage was accordingly executed, by which the committee and the parties entitled to the other fourth part, who had disentailed their share, demised the estate to a mortgagee for 2000 years, subject to the jointure rent-charge, and subject to a proviso for redemption on payment of £6221 and interest.

On the 1st of November, 1878, an action for partition of the estate was commenced, some of the owners of the remaining fourth part being Plaintiffs, and *Mary Tylston Pares*, her committee, and the other owners of the remaining fourth part being Defendants. The remainder in fee expectant on the failure of issue of the lunatic had been purchased by persons of the name of *Stone*.

A petition was now presented by the committee of the lunatic asking that he might be authorized under sect. 6 of the *Partition Act*, 1876, to request a sale of the *Narborough* estate, and to execute all necessary deeds for conveying the lunatic's estate.

When the petition first came on it was referred to the Master in Lunacy to report what was most for the benefit of the lunatic and her estate. The Master reported that it would be most for the benefit of the lunatic and her estate that the *Narborough* estate should be sold, and that the committee should apply in the action for a sale and not a partition.

The petition now came on for further hearing.

W. Pearson, Q.C., and *J. Mander*, for the Petitioner.

Robinson, Q.C., and *Cozens-Hardy*, for the remaindermen expectant on the failure of the lunatic's estate tail:—

We have no objection to a sale, provided it be carried out so as

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(1) *In re Pares*, 2 Ch. D. 61.

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not to affect the devolution of the proceeds of the sale under the entail. However, we submit that the Court has no power to bar the entail of a lunatic tenant in tail. The 124th section of the *Lunacy Regulation Act*, 1853, only applies to property of which the lunatic is seised in fee.

[JAMES, L.J.:—The word used in the section is simply "seised." A tenant in tail is seised of the land.]

At all events it is against the principle on which the Court acts to dispose of a lunatic's estate so as to interfere with the interests of those entitled in remainder.

Fischer, Q.C., and *Upton*, for the co-heiresses and next of kin of the lunatic:—

The Court has jurisdiction to bar the entail under the 124th section of the *Lunacy Regulation Act*, and if not, under the 136th section, which enables the Court to exercise any power vested in a lunatic for his own benefit.

[JAMES, L.J.:—The right to bar an entail is not a power.]

It is so spoken of in the 15th section of the *Fines and Recoveries Act*. In *In re Blewitt* (1) the Court barred an estate tail where the lunatic was tenant in tail in possession, thereby overruling the former decision in the same case (2). The lunatic, if sane, would have probably disentailed the estate so as to benefit her own near relations rather than the remaindermen, who are strangers.

COTTON, L.J.:—

On the main point I feel no doubt. When asked under our jurisdiction in Lunacy to sell the lunatic's estate, I am of opinion that, as between the lunatic and the remaindermen, or between the lunatic's heirs-at-law and next of kin, it is the duty of this Court not to alter the nature of the property or the devolution of the estate after the death of the lunatic. That is clear from the 124th section of the *Lunacy Regulation Act*, 1853, which gives power to the Court to sell the lunatic's estate under certain circumstances, but directs that the proceeds should be applied in such a way as to retain the original nature of the property, so as not to change its destination. Therefore, if the Court in this case consents to a sale of the estate, it must be, in my opinion, only if the Court can secure the proceeds of the sale going in the same way as the estate would have done. If that cannot be done, or if there is no evidence that it is necessary for the maintenance of the lunatic to turn the estate into money, I think it would be proper not to sell it. We are asked to assume that the lunatic, if sane, would have sold the estate and barred the remaindermen, who are strangers, in order to benefit her family. The Court cannot act on that supposition.

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(1) 6 D. M. & G. 187. (2) 3 My. & K. 250.

As to the jurisdiction to bar the entail, we will hear Mr. *Pearson* in reply.

W. Pearson, in reply, referred to *In re Sherrard* (1); *In re Bloomar* (2); both of which were decided under the 124th section of the *Lunacy Regulation Act*, 1853.

COTTON, L.J. :—

I think we have power under the 124th section to authorize the committee to join in the sale, but only for the purpose of giving effect to the conveyance to the purchaser; but the money to arise from the sale must remain subject to the uses declared in the will of the estate sold. The purchaser must bring the money into Court in the lunacy and in the action; and all parties will be at liberty to apply respecting it.

JAMES and BRETT, L.JJ., concurred.

Solicitors: *C. J. Mander*, agent for *Miles & Co., Leicester*; *Hunter, Gwatkin, & Co.*; *Field, Roscoe, & Co.*

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(1) 1 D. J. & S. 421.

(2) 2 De G. & J. 88.

Ex parte SCHOFIELD. *In re* FIRTH.

C. A.
1879
C. J. B.
April 7.
C. A.
July 24.

16 Ch D
335—
19 Ch D

Proof in Bankruptcy—Secured Creditor—Valuation of Security—Bills of Exchange held by Banker "pending discount"—Amendment of Proof—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16, 40—*Bankruptcy Rules*, 1870, *rr.* 99, 100.

Bills of exchange indorsed by a customer to his banker in order that they may be discounted, and held by the banker "pending discount," *i.e.*, pending inquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, are not securities, which the banker, in proving in the customer's bankruptcy for the amount due to him by the customer, is bound to value. The banker is entitled to prove for the full amount due to him, and also to recover what he can from the other parties to the bills, provided that he does not receive in the whole more than 20*s.* in the pound.

In the case of an evident mistake, an amendment of a proof will be allowed after the creditor has voted in the choice of a trustee.

JAMES FIRTH, a woollen cloth manufacturer at *Rastrick*, filed a liquidation petition in March, 1877. The creditors, at their first meeting, on the 5th of April, 1877, resolved upon a liquidation by arrangement. At that meeting the *London and Yorkshire Bank*, who had been the debtor's bankers, tendered a proof for £17,793 4*s.* 7*d.* The affidavit of proof, made by the bank manager, stated that the debtor was, at the date of the filing of the liquidation petition, indebted to the bank in the above sum, for money advanced to him, and that the bank had not received "any manner of satisfaction or security whatsoever, save and except the bills of exchange mentioned in the schedule hereupon indorsed, and certain shares in the bank, certain title-deeds of property belonging to *Alfred Kitleys*, and certain certificates of shares in the *Borovitchie Railway Company*, the total value of which, so far as they form part of the estate of the said *James Firth*, I value at £1000." The £17,793 4*s.* 7*d.* was the balance of a debt of £18,793 4*s.* 7*d.* after deducting the £1000 for the value of the securities. The bills mentioned in the schedule were drawn, most of them by *Firth*, but some by other persons, upon different acceptors, and represented a total amount of £24,861. They were all indorsed by *Firth* to the bank. Some of them had been discounted by the bank immediately on their receiving them, and the amount of the bills, less the discount, had been carried to the credit of *Firth's* current account. The remainder of the bills, the bank not being satisfied without inquiry as to the solvency of the acceptors, were held by the bank "pending discount," *i.e.*, pending the result of inquiries to be made. But the bank had allowed *Firth* to overdraw his account to the extent of several thousands of pounds upon the credit of those bills, without, however, attributing the advances thus made to any particular bills. The £18,793 4*s.* 7*d.* included the sums advanced by discounting the bills which had been discounted, as well as the overdraft of the account. The bills discounted amounted to about £13,000; the bills held "pending discount" to about £11,000.

On the 2nd of August, 1878, the trustee in the liquidation applied to the County Court for an order directing the bank to deliver up to him all bills of exchange and promissory notes, or other negotiable securities received by the bank "pending discount" from the debtor, and then in their possession. The application was made on the ground that the bills held "pending discount" were securities for the debt due, which were included in the valuation of £1000 mentioned in their proof, or, if not so included, had been forfeited by the bank's proving their debt without setting a value upon them.

The manager of the bank made an affidavit, in which he stated that he prepared his affidavit of proof without any professional assistance, upon a printed form, in which he made alterations, and that he did not intend to include any bills of exchange in the valuation of £1000, but intended that valuation to apply only to the shares and title-deeds specified in the proof. He was examined in the County Court, and then stated that the bills held "pending discount" had been lodged with the bank by *Firth*, on the express understanding that they were to be discounted, though the bank reserved the right to reject them in case they should not receive a favourable report of the acceptors. But the bank had made advances upon these bills, and held them as a security for the advances. The manager admitted that the bills had been entered in a book kept by the bank, under the head of "bills for collection"; but he explained that entry by saying, "It is a title adopted throughout the bank to distinguish all bills which are not discounted: it is a technical title. Some banks call them 'short bills.'" He added that he should call them by that name until they were discounted.

The Judge dismissed the application, on the ground that the bills held "pending discount" were not securities within the meaning of the *Bankruptcy Act*, 1869.

The trustee appealed to the Chief Judge. The appeal was heard on the 7th of April, 1879.

De Gex, Q.C., and *E. Cooper Willis*, for the Appellants:—

The bills which the bank held pending discount belong to the debtor's estate, subject to the lien of the bank for the moneys which they have advanced; in other words, they are property of the debtor on which the bank hold a security. They are mortgaged bills, and do not stand on the same footing as discounted bills. Bills deposited as collateral security must be valued like any other security, and proof made for the balance of the debt, after deducting the value of the security: *Robson's* Bankruptcy (1); *Ex parte Price* (2). If a secured creditor proves for the full amount of his debt he forfeits his security: *Ex parte Hornby* (3); *Ex parte Solomon* (4); *Ex parte Eggington* (5); *Ex parte Middleton* (6); *Stammers* v. *Elliott* (7); *Ex parte Ashworth* (8); *Bankruptcy Act*, 1869, ss. 16, 40; *Bankruptcy Rules*, 1870, rr. 99, 100. Either the valuation of £1000 was meant to include the bills held "pending discount," or it was not. If the former the bank are bound by their valuation, and cannot retain more than £1000 from their securities; if the latter, by proving for their debt, without accounting for the value of the bills, they have forfeited their security on those bills, and must give them up to the trustee. They cannot be permitted to amend their proof: *Ex parte Adamson* (9), and the cases there cited. The indorsement of the bills to the bank does not shew conclusively that they have received them for the purpose of discounting them; that would only be the *primâ facie* effect of the indorsement: *Ex parte Twogood* (1). The fact that in this case the bank entered the bills in their books under the head of "bills for collection," goes to shew that they had received them merely as agents for the bankrupt, and, if so, they have no property in them, and must give them up to the trustee.

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(1) 3rd Ed. p. 223.
(2) 3 M. D. & D. 586.
(3) Buck. 351.
(4) 1 Gly. & J. 25.
(5) Mont. 72.
(6) 3 D. J. & S. 201.
(7) Law Rep. 3 Ch. 195.
(8) Ibid. 18 Eq. 705.
(9) 8 Ch. D. 807.

Winslow, Q.C., and *Finlay Knight*, for the bank, were not heard.

BACON, C.J.:—

Although I have heard a most ingenious argument by Mr. *De Gex*, it seems to me to be a very clear and very familiar case. Nothing is more common than such transactions between bankers and their customers. It is said that these bills were deposited with the bank as security; they were not deposited, but they were handed to the bank for the purpose of being discounted. The particulars of the bills are sent with a request that the bank would be so good as to discount the bills, and the answer returned was this, "We cannot do that at once, because we want to see what they are worth, but you may draw upon us;" and yet it is said that the bills were sent to the bank not for the purpose of discount but for deposit, with the accommodation to the debtor of drawing in respect of them. That, however, does not dispose of the case. I may refer to the every day familiar practice in the administration of bankruptcy that, when a man holds bills of exchange upon which a bankrupt and other persons are liable, he has a right to retain those bills, and to get what he can from them, to prove for the whole debt which the bankrupt owes him, he being liable to return the amount of the debt so proved, if, when the dividend is declared, it turns out that he has received any of the bills. He is bound to state the bills in his proof, and that is all he is bound to do. The bankers' lien, it cannot be disputed, overrides everything that is in the bankers' hands, and when Mr. *De Gex* refers me to *Ex parte Hornby* (2) and *Ex parte Solomon* (3), I ask what kind of application have they to this case? In those cases solicitors had a lien upon books, papers, and other things which I need not mention, and they proved for the amount of their lien without mentioning the lien in their proof. But here the bankers in all frankness and honesty say, "The debt due to us is so much money, for which we have no security, except the bills of exchange mentioned in the schedule hereupon indorsed, and some other things, and the value of them is £1000." It is said that the terms of the proof preclude the question, because the exception includes the bills of exchange, and the value of £1000 includes the whole of what is excepted. I do not see any necessity for amending the proof, but if there were, I should with the utmost readiness allow such an amendment to be made as might be necessary to disclose the true meaning of the proof. It is not a case where a man asks for leave to amend his proof after voting for the choice of a trustee on a proof which he says is erroneous, and wants to make a new case. The exception stops at the word "indorsed;" it goes as far as that word and then stops. Then the proof goes on to say, "certain shares, and so on, the total value of which, so far as they form part of the estate, I value at £1000." I think that the proof is accurate and proper in every respect. But, were it otherwise, and were any words wanted merely to complete and shew more clearly and distinctly the meaning which the deponent had in his mind when he swore to the proof, I should without hesitation allow him to amend it. I feel fully the justice of what Mr. *De Gex* has said, that the Court does not allow a man who has made a proof in mistake to change his front and come with a different kind of demand; but here I find no such case as that. The proof is consistent with the every-day practice in bankruptcy in respect of proof for a debt, part of which is connected with bill transactions—to mention the bills, but not to deduct any value in respect of them. Who can tell whether they have any value? Are they prepared to represent that they are worth 20*s*. in the pound? How can they say what accident may happen to the other parties to the bills—whether they may become bankrupt, or what dividend may be relied on? No one can tell anything about that. It is necessary for the administration of the bankrupt's estate that the trustee and the creditors should know the nature of the bills upon which the bankrupt is liable. In this

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(1) 19 Ves. 229.

(2) Buck. 351.

(3) 1 Gly. & J. 25.

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particular case there is no possibility of doubt. Mr. *De Gex* says that a creditor cannot take a part of the whole, and the whole of a part of the estate. No doubt that is so; it is fundamental doctrine. But in order to apply it you must make out that it is a part of the bankrupt's estate. In my opinion these bills are no part of the estate. A man indorses bills of exchange to his banker, and says, "I owe you a good deal of money; you can collect these bills for me and carry them to my account." Those bills no longer remain part of the customer's estate, so as to deprive the banker of the full title in law and equity which arises out of such transactions between bankers and their customers. None of the cases cited touch the cardinal principles to which I have been adverting, or say that the established practice in bankruptcy is erroneous with regard to bills of exchange. It was impossible that the bank should be able to put any value whatever upon these bills, except the value which is expressed by mentioning the sum for which the bills are drawn.

I think the order of the learned Judge was in all respects right, and that there is no ground whatever for this appeal. I cannot see any principle of law on which this proof can be impugned. It is on the face of it preposterous to imagine that the bank meant to include £24,000 worth of bills in the value of £1000. A fair meaning must be given to the proof; it must not be stretched to include something which the parties themselves evidently did not intend to include.

Mr. *De Gex* argued that the indorsement of the bills was in the nature of an assignment of a bond, or something subject to an equity of redemption. But bills of exchange are not in the slightest degree like a bond or a mortgage, and if I were to hold, which I do not as a matter of law, that in respect of these bills there was an equity of redemption, that could not arise until the trustee had paid 20*s.* in the pound upon the bills. If he is willing to do that, of course there would be no objection to it.

There is no ground for this appeal, and it will be dismissed with costs.

C. A. From this decision the trustee appealed. The appeal was heard on the 24th of July, 1879.

De Gex, Q.C., and *E. Cooper Willis*, for the Appellant:—

The bills in question were called indifferently, bills held "pending discount," or "short bills," or "bills for collection"; they were the property of the customer, and the bankers had only a lien upon them. The fact that the bills were indorsed by the customer does not necessarily prove an absolute transfer to the bankers: *Ex parte Twogood* (1). If a banker does not buy or discount bills, but only takes a mortgage of them, they remain the property of the customer, and the banker has only a lien on them for what is due to him from the customer.

[BRETT, L.J.:—Could not the bank have sued *Firth* as an indorser of the bills? If they could, they were the owners of the bills. If a bill is indorsed to a banker merely for the purpose of collection there is no consideration, and he could not sue the indorser.]

The bank were only indorsees by way of mortgage. Bills entered by a banker as "short" remain the property of the customer: *Thompson* v. *Giles* (2). And by their proof the bank have either included these bills in the valuation of the £1000, or, if they have not, they have not valued them at all, and they have therefore forfeited their security on the bills: *Ex parte Hornby* (3): *Ex parte Eggington* (4); *Ex parte Solomon* (5); *Stammers* v. *Elliott* (6); *Ex parte Ashworth* (7); *Cooke's* Bankrupt Law (8). A creditor makes an election by his proof, and, except in the case of fraud, a creditor who has made an election cannot change his mind: *Ex parte Adamson* (9). A security is not the less a security because it is a negotiable instrument: *Ex parte Price* (10). If the proof is amended that will make no difference to the bank.

Winslow, Q.C., and *Finlay Knight*, for the bank:—

This is the first time the attempt has been made to take away the right of the indorsee of a bill of exchange to sue or prove against all the parties to the bill until he has received 20*s*. in the pound.

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(1) 19 Ves. 229.
(2) 2 B. & C. 422.
(3) Buck, 351.
(4) Mont. 72.
(5) 1 Gly. & J. 25.
(6) Law Rep. 3 Ch. 195.
(7) Ibid. 18 Eq. 705.
(8) 8th Ed. p. 144.
(9) 8 Ch. D. 807.
(10) 3 M. D. & D. 586.

[COTTON, L.J.:—The question is whether, when bills have been deposited by a bankrupt as security they must not, notwithstanding the fact that he had indorsed them, be treated as part of his estate.]

The rule is the same whether bills are discounted or they are deposited as security for advances: *Ex parte Bloxham* (1). In that case the bills had not been discounted.

[COTTON, L.J.:—The question was to what extent proof could be made against the other parties to the bills.]

The rule is thus stated in *Robson's* Bankruptcy (2): "If, however, the bill is indorsed, the presumption will be that the intention was to give the indorsee power to go against all the parties to it."

[COTTON, L.J.:—Buying a bill is a different thing from taking it as a security.]

In *Ex parte Philipps* (3), Sir *George Rose* said: "In all these cases the question is whether the bills were indorsed by the party depositing them, or were deposited as mere chattels to secure the payment of the debt." *Reid* v. *Furnival* (4) is to the same effect. In *Ex parte Twogood* (5) Lord *Eldon* said (6): "Where bills remitted are indorsed, the holder *primâ facie* may go against every one whose name is on them; and, all these bills being indorsed, it is upon the other side to prove that the meaning was not to give a demand upon the bills against the drawer and indorsers . . . . The circumstance of indorsement does not make a difference if the real meaning was deposit; . . . . but it must be clearly established, that, notwithstanding indorsement, the object was a mere deposit." *Ex parte Martin* (7); *Ex parte Burn* (8) are authorities to the same effect. No doubt if any of the bills had been paid in full by another party, we must have reduced our proof to that extent. In *Ex parte Sammon* (1) it was held that where bills had been delivered by the drawer to a creditor as collateral security for a debt, the creditor was entitled to receive 20*s.* in the pound on the bills from the estate of the acceptor, and also to prove for the full amount of the debt against the estate of the drawer.

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(1) 6 Ves. 449, 600.

(2) 3rd Ed. p. 222.

(3) 1 M. D. & D. 232.

(4) 1 C. & M. 538.

(5) 19 Ves. 229.

(6) Ibid. 231.

(7) 2 Rose, 87.

(8) Ibid. 55.

[JAMES, L.J.:—There was no sale of the bills there.]

It was, as here, a security with the intention to pass the property in the bills.

[JAMES, L.J.:—An intention that the indorser should be liable.]

That decision is clearly inconsistent with the trustee's claim in the present case. The bills were indorsed in that case. *Ex parte Reed* (2) is a similar case. *Ex parte Rufford* (3) was disapproved in *Ex parte Sammon*, but the principle of it was carried further. There cannot be a partial indorsement of a bill of exchange: *Byles* on Bills (4). When a bill is indorsed and delivered to the indorsee it becomes his property; it is no longer the property of the indorser.

[BRETT, L.J.:—A bill may be indorsed for the purpose of collection.]

In such a case there is no intention to pass the property in it; the indorsee could not sue the indorser. He could only collect the money due on the bill, and give a receipt for it. In the present case the bills could not have been withdrawn from the bank without repaying the advances which they had made. It has never been the practice to value bills of exchange as securities except where they have been deposited as mere chattels.

As to the effect of the proof, it is clear there was no intention to include the bills in the valuation of £1000. The question would be whether we have elected to abandon our security. In *Ex parte Wood* (5) some doubt was thrown upon *Ex parte Ashworth* (6).

[JAMES, L.J.:—You clearly did not intend to elect to give up your security. If necessary we should set the matter right.]

Ex parte Adamson (7) shews that a creditor is not estopped by the receipt of dividends from changing his election.

(1) 1 Dea. & C. 564.
(2) 3 Dea. & C. 481.
(3) 1 Gly. & J. 41.
(4) 12th Ed. p. 172.
(5) 10 Ch. D. 554.
(6) Law Rep. 18 Eq. 705.
(7) 8 Ch. D. 807.

De Gex, in reply:—

[JAMES, L.J.:—The Chief Judge, who is one of the best authorities as to the *cursus curiæ*, says that it has never been the practice to treat indorsed bills of exchange as securities to be valued.]

No authority has been cited against our argument. In *Ex parte Sammon* (1) the question was what was to be done with a bill which had been sent generally on account as collateral security; it was assumed that the bills remained the property of the debtor who had deposited them. In the present case, if the customer had been solvent and the bankers bankrupt, the customer would clearly have been entitled to the bills on paying the balance due from him. That would not have been so in *Ex parte Sammon.* If bills have not been negotiated, the indorsement makes no difference. It is not disputed that if they had been simply deposited, they must have been valued. Why should the indorsement make a difference? It is simply a guarantee by the customer for payment. But it has never been used, for the bills are still in the hands of the bank. Why should the addition of the customer's guarantee make a bill of exchange differ from any other property of the customer? What difference is there between a negotiable credit and any other credit—for instance, a bond? In *Ex parte Waring* (2) bills of exchange were treated just as bales of goods.

[COTTON, L.J.:—The indorsement was made for the purpose of discount. Does the fact that the bill was not at once accepted for discount enable you to say that it was not indorsed for discount?]

In either case it is an alienation of a part of the debtor's property—a sale or a mortgage. If short bills were deposited by an overdrawn customer with his banker, no doubt the bankers could negotiate the bills if the overdraft was not paid. But they would be trustees of the surplus for the customer. The cases relied upon against us do not support the contention of the Respondents, and there is no principle upon which this kind of property can be distinguished from any other.

JAMES, L.J.:—

Upon full consideration of this matter, we are of opinion that we cannot differ from the conclusion at which the Chief Judge has arrived. We say that with all respect for the very ingenious and very able argument which Mr. *De Gex* has addressed to us. I am bound to say that we are very much governed by what the Chief Judge has said as to his own knowledge of the course of practice in bankruptcy, and the course of business in these banking matters which have come so frequently before the Court of Bankruptcy. Speaking from that knowledge, and from the tradition of the Court (and in this Court tradition is sometimes as valuable as, if not more valuable than, the written word), it struck him as being an absolute novelty that a banker should be called upon to value bills of exchange upon which he had the name of a bankrupt customer, as well as other names, as his security, and which had been pledged to him for that customer's debt either wholly or partly. No doubt at the moment when the bill of exchange was indorsed by the customer he had to some extent a right of property in it, and it might be said that he was then depositing his property with the banker by way of security, but the rule seems to have been laid down a great many years ago by Lord *Eldon*, that the test whether a bill of exchange is to be valued as a security or not is whether the customer's indorsement was made under such circumstances as to shew that the intention of the parties was that he should be liable as indorser upon the bill; that is to say, whether it was a complete indorsement, giving all the legal remedies of an indorsement, or whether it was meant to be practically an indorsement without recourse. An ordinary indorsement might be made so as to be practically in Equity an indorsement without recourse. If so, then the indorsement would be of no benefit to the indorsee. But otherwise the conclusion at which Lord *Eldon* seems to have arrived was, that the indorsement of itself shewed that there was to be a transfer of the bill of exchange to the banker or other persons advancing money upon it, with all the remedies, in bankruptcy and otherwise, which such indorsement could give.

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(1) 1 Dea. & C. 564.

(2) 19 Ves. 345.

There are several reported cases in which something of the same kind as in the present case has arisen, that is to say, in which proof has been made on two estates where bills had been deposited as collateral security, and the point which is now raised seems never to have been suggested by any one, but all the cases appear to have proceeded upon the assumption that the current law and

16 Ch D 85

practice of the Court were otherwise. I think it may probably be explained in this way, that although at the moment before the indorsement the bill was property of the customer which he was indorsing, that is, he had a right to sue the acceptor, and a right to sue any prior indorser, as it might have represented the value of goods sold by him, yet when it was taken to the banker under such circumstances as in the present case, taken by the customer with his indorsement on it, it was taken by him as borrower to the banker as lender as being an instrument exactly the same in effect as if all the parties to it had then at that moment joined in giving their personal security for the debt. The customer was able to say to the banker, "If you lend me money you will have my liability. I am not giving you property. You know that if you lend me the money, you will have as your security my liability and also the liability of *A. B.*, *C. D.*, and *E. F.* upon these bills. You will have all these liabilities in exactly the same way as if we had all now joined in giving a joint and several promissory note, or as if each of us had given a several promissory note by way of security for the loan." *Non constat* that the bills of exchange ever were property in the hands of the customer. Suppose they were accommodation bills, that the customer had not got one farthing of interest in them, that he had not parted with any property of his own for them, but that he had only got a friend to lend him his name as acceptor, and had then taken the bills to the banker, could it be doubted in such a case that there was no security upon any property of the customer? He had no property; he was only giving the security of somebody else. And therefore there seems to be nothing unreasonable in saying, You are not to inquire into the circumstances, why or wherefore these names appear upon the bills; whether they were accommodation acceptances or acceptances for value, or for what value; or whether upon the state of the account between the parties anything is due from the one to the other. Those inquiries are not to be entered into, but the instrument is given by the borrower and accepted by the lender as being an instrument with several names upon it, which the borrower is able at that time to tender to the lender as personal sureties for payment of the amount advanced to him.

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In re
FIRTH.

I think that probably explains the matter, and we shrink, if I may say so, from introducing something which, as we believe, would entirely alter the understanding and practice which has prevailed, as the Chief Judge says, for years and years in these matters, not only in law but in the commercial world generally.

We are, therefore, of opinion that the order of the Chief Judge must stand, and the appeal be dismissed with costs.

BRETT and COTTON, L.JJ., concurred.

Solicitor for Trustee: *J. W. Sykes*, agent for *Ramsden & Sykes, Huddersfield.*

Solicitors for Bank: *Bischoff, Bompas, & Co.*, agents for *F. Barber, Brighouse.*

NEWINGTON LOCAL BOARD *v.* ELDRIDGE.

[1879 N. 82.]

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V.-C. B.
1879
July 19, 24.
C. A.
uly 25.

Solicitor's Lien—Clerk to Local Board—Production of Documents—Order on Interlocutory Application.

Where a solicitor had been appointed clerk to a local board, with a salary, for conducting the legal as well as the ordinary business of the board, it was *held* by *Bacon*, V.C., upon an interlocutory motion in an action for mandamus to compel production of papers, that, whatever claim the clerk might have against the board for payment of costs in respect of professional services, he had no right, being in the relation of servant to the board, to refuse production of the legal papers or other documents claimed by the board as belonging to them:—

But *held*, by the Court of Appeal, that as such an order would prejudice the clerk's lien, it could not be made before the trial of the action without payment into Court of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers; and the Court ordered that upon that being done the clerk should deliver up to the Plaintiffs all books and papers claimed in the action.

THE Plaintiffs were a local board constituted under the *Public Health Act.* The writ was for a mandamus commanding the Defendant, *John R. W. Eldridge*, to deliver over to *Charles J. Todd*, the present clerk of the above-named Plaintiffs, all books, minute books, books of account, rentals, maps, bills, receipts, vouchers,

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leases and counterparts, securities, muniments, pleadings, affidavits, exhibits, briefs, office copies, records and papers of or belonging to the Plaintiffs or relating to the property thereof in his custody and power; and for an injunction restraining the Defendant, his agents and servants, from parting with any of the said papers or documents mentioned in the first paragraph, except to the Plaintiffs; and for an order on the Defendant to hand over, within twenty-four hours after the date of the order, to the said *Charles J. Todd,* as such clerk as aforesaid, all briefs, affidavits, office and other copies of documents, pleadings, and papers necessary to enable the said *Charles J. Todd,* as such clerk as aforesaid, to instruct counsel and do all necessary acts for the purpose of prosecuting the appeal in the action *Newington Local Board* v. *Cottingham Local Board* [1878 N. 62] from the decision of Vice-Chancellor *Malins* to the Court of Appeal.

The Plaintiffs moved for an order in the terms of the claim in the action.

It appeared from the affidavits in support of the motion, that in pursuance of a resolution passed by the board on the 27th of September, 1876, the Plaintiffs issued the following advertisement in the local newspapers:—"Local Board for the District of *Newington.*—The board require the following officers: Clerk, salary fifty guineas per annum. Must be a solicitor. He will be required to do all the legal and other business that the board may require him to do. The salary will not include out-payments or expenses of journeys." In reply to this advertisement various applications for the office of clerk were received, and among them one from the Defendant; and at a meeting of the board held on the 10th of October, 1876, the following minute was agreed to:—"Mr. *Eldridge* duly elected clerk to the board on the terms mentioned in the resolution of the 27th of September, 1876." The Defendant thereupon entered upon his duties, but no formal agreement in writing was ever entered into between him and the board.

On the 27th of October, 1877, at a meeting of the parliamentary committee of the local board it was decided to allow the clerk all taxed costs for his professional services in respect of a matter relating to the extension of the district, and the Defendant was paid £35 15*s.* 2*d.* for law charges in respect of the same. On the 9th of July, 1878, at a meeting of the finance committee of the board, an application by the Defendant for an increase of salary was taken into consideration, and the following resolution was passed:—"That in reply to Mr. *Eldridge's* application, his salary be increased for his ordinary duties (that is, not including actions, arbitrations, parliamentary proceedings, journeys out of town, &c.) from fifty guineas to eighty guineas per annum."

On the 5th of July, 1878, at a meeting of the board to consider a question relating to a deficiency of railway accommodation in the district the following resolution was passed:—"That the law clerk be and he is hereby authorized and instructed to bring the question of railway accommodation before the Railway Commissioners, and to instruct counsel and take all necessary steps in the matter, and that his costs for the same be paid." Proceedings in connection with the subject of railway accommodation were accordingly taken, and the Defendant brought in his bill of costs in respect thereof, which amounted to the sum of £1420 16*s*. A part of this sum was paid to the Defendant on account. Proceedings were subsequently taken by the board in the Chancery Division against the local board for the *Cottingham* district, and a resolution was passed by the board on the 17th of June, 1879, in these words: "That the law clerk be instructed to move the Chancery Division of the High Court of Justice for an injunction herein, and employ counsel, and that his costs be allowed for so doing." The proceedings in this last matter resulted in an adverse decision, and the board was advised to appeal against that decision, and the appeal was set down for hearing.

The Plaintiffs called upon the Defendant to resign, and upon his refusal to do so they passed a resolution on the 9th of July instant, "That Mr. *Eldridge* be removed from his office of clerk to the board, and that on payment of his salary up to that day he be requested to hand over to the chairman all books, papers, and documents in his custody as such clerk, and that a cheque for £25 17*s*. 7*d*. for such salary be paid to him." The Plaintiffs also obtained an order to change their solicitors. In the Plaintiffs' affidavits it was stated that an application was made to the Defendant for the books, papers, and documents in his possession, but he declined to deliver them up, stating that he claimed a lien on them in respect of his costs; and no books, papers, or documents of any kind had yet been handed over to the board. It was further stated that the Plaintiffs did not at any time intentionally retain the Defendant as their solicitor, and they considered that in all the litigation that had been carried on under his advice he was acting simply as their clerk, and they submitted that it never was the intention of the board to allow him to charge profit costs against them, and that on the original contract and facts above stated he was not entitled to make any such charges.

The Defendant had not up to the present time delivered his bill of costs in the pending suit against the *Cottingham* board, and he had declined to deliver the briefs or take any further steps, on the ground that his costs had not been paid. The hearing of the appeal had been delayed in order to enable the Plaintiffs to obtain the papers in the action from the Defendant.

The Defendant, in his affidavit, stated that in his correspondence and communication with different members of the Plaintiffs' board he was always informed that he should be paid his proper costs, subject to taxation, for all legal business transacted by him on behalf of the board over and above the ordinary duties of clerk to the board. That the words used in the different resolutions of the board subsequently to his original appointment had been inserted expressly for the purpose of securing to him his reasonable costs in the conduct of legal business, and that such was the intention of the board and was well understood by the members thereof, who heard the minutes of each meeting read out to them and received a copy of such minutes before the meeting of the board at which the minutes were confirmed. That he had in fact received sums of money for costs in respect of various legal matters transacted for the board, but that they were now so largely in his debt that he could not continue to carry on the appeal now set down for hearing without payment of his costs. He further stated that he had only refused to give up to the board the documents upon which he had a lien for his professional costs, but he had always been ready and willing to give up the books and other documents relating to his office of clerk to the board.

The motion came on for hearing before Vice-Chancellor *Bacon* on the 19th of July 1879.

Sir *H. Jackson*, Q.C., and *Crossley*, in support of the motion:—

The Defendant being the clerk to the board, and, consequently, their servant, has no right to retain any papers belonging to the board. The original contract entered into with the Defendant is still in force, and by that contract he was to do all the legal and other business that the board should require him to do, but the salary not to include out-payments or expenses of journeys. The terms of that contract were not varied by any of the subsequent resolutions of the board. If the Plaintiffs thought fit to pay him extra for any particular business, that was in the nature of a gratuity, but all he was entitled to receive was his out-payments, that is, his costs out of pocket, and his journeys. That was the construction which the board put upon the resolutions, and which all the members of it believed to have been the construction; any further payments would have been *ultrà vires.* The board are authorized by the *Public Health Act* (38 & 39 Vict. c. 55), s. 189, to appoint officers at such reasonable salary, wages, or allowance, as they think proper, and they have no power to give them extra remuneration for services properly falling within the terms of their appointment, or to alter the terms of the original appointment; and by the 193rd section every officer exacting or accepting any fee or reward other than his proper salary is liable to a heavy penalty.

There never was a contract to employ the Defendant in transacting legal business under the seal of the board, and consequently such appointment could not be valid, and the contract could not be enforced: *Hunt* v. *Wimbledon Local Board* (1); *Arnold* v. *Mayor of Poole* (2).

Hemming, Q.C., and *H. Green*, for the Defendant:—

The present motion is entirely at variance with all the authorities. It was distinctly laid down in *Rex* v. *Sankey* (3) that a town clerk has a lien on papers of the corporation with respect to which he has done work as solicitor, but not on such as he holds as town clerk. Mr. *Eldridge* was the clerk to the local board, and he was also employed by the board as their solicitor to transact legal proceedings. In the character of town clerk he had various rate-books and papers belonging to the corporation in his custody, and those documents he has offered to give up, but the law papers and documents in his possession as solicitor transacting the legal business of the corporation he claims to retain until his bill of costs is paid. In his character of solicitor the law is precisely the same as it would be between any ordinary client and his solicitor. Mr. *Eldridge* was discharged by his client, and he therefore has a lien upon the papers. It has been decided in many cases, such as *Lord* v. *Wormleighton* (1) and *Griffiths* v. *Griffiths* (2), that where a solicitor is discharged by his client he is not bound even to produce the papers in his possession, although it is different if he discharges himself. In the latter case the client might not be able to prosecute his suit, or to obtain the money wherewith to pay his solicitor, unless he could obtain the papers, but even then the solicitor would retain his lien though he produced the papers. In *Bozon* v. *Bolland* (3) it was said by the Lord Chancellor that where a solicitor was discharged he could not be compelled to afford any facilities to his client by the use of the papers. *Ex parte Yalden* (4) was a stronger case than this, because there the solicitor who was allowed a lien upon the papers was in fact an officer of the Court of Bankruptcy. *In re Faithfull* (5) was a case of the same description, and the Vice-Chancellor there remarked upon the right of a solicitor who had not been paid his bill of costs to embarrass his client in prosecuting or defending his claims.

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(1) 3 C. P. D. 208.
(2) 4 Man. & G. 860.
(3) 5 A. & E. 423.

No doubt the solicitor's lien, in this as in every case, is an obstructive lien, but we do not wish to use more obstruction than is necessary to secure our rights, and are quite ready to give up all the papers on having the amount of our claim paid into Court.

It has been said that Mr. *Eldridge* was never appointed solicitor under the seal of the board, but if he was not duly appointed, then he has done the legal business on his own account, and the papers are his own, and he has actual property in them instead of the ordinary solicitor's lien. The fact is, however, that he has been paid large sums of money by the board for legal business, and he was regularly appointed by a resolution of the board, describing particularly the matters for which he was to receive extra costs; those matters included "actions, arbitrations, parliamentary proceedings, journeys out of town," &c.

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(1) Jac. 580.

(2) 2 Hare, 587.

(3) 4 My. & Cr. 354.

(4) 4 Ch. D. 129.

(5) Law Rep. 6 Eq. 325.

This is an application for a mandamus, and the granting such orders is always purely in the discretion of the Court. That was held in *Reg.* v. *Churchwardens of All Saints, Wigan* (1). The Court in such cases will look to the conduct of the parties, and will say whether, under the terms of the Judicature Rules, it is just or convenient to grant such an order; or, as the Master of the Rolls expressed it in *Day* v. *Brownrigg* (2), whether it is both just and convenient. A writ of mandamus is only granted where there is no other remedy; that is so laid down in *Tapping* on Mandamus (3). Here there is another remedy quite as adequate and more convenient, which is, to go before a magistrate under the powers of the *Public Health Act.* This is not the right remedy, and the Court would not be inclined to exercise its discretion in making such an order as this, the effect of which will be to deprive Mr. *Eldridge* of his just rights.

Sir *H. Jackson*, in reply:—

The real question is one of law as to what is the course which this public body ought to pursue. Mr. *Eldridge's* bill of costs is a very heavy one, and he has been paid a large sum already, more in fact than his costs out of pocket. Our contention is that we contracted with him to do the legal business of the board for the amount of his salary, and he was to have costs out of pocket for all extra business transacted by him. That was the real meaning of the resolution appointing him. A statutory body can only act under the express powers given them by their Act. The 189th section enables the local board to appoint proper persons to certain offices, which includes their clerk. They have appointed him clerk, but in employing him as solicitor he was acting under

(1) 1 App. Cas. 611.

(2) 10 Ch. D. 294.

(3) Page 4.

the contract, which was that he should transact the legal business That gives him no power to retain the papers belonging to the board. This question is covered by the case of *Webster* v. *Le Hunt* (1), where a solicitor agreed with his client to carry on a suit without requiring funds up to the hearing, and it was held that meant the original hearing, but he had no right to withhold the papers from another solicitor to conduct an appeal, and an order was made for the first solicitor to deliver up the papers without prejudice to his lien, upon an undertaking by the new solicitor to restore them when the appeal was disposed of. We are now appealing in the case which Mr. *Eldridge* conducted up to the original hearing, and though he might have a lien upon the papers after the hearing of the appeal, he cannot now refuse production of the papers for the purpose of the appeal. We offer to give him security for the return of the papers after the appeal is heard, and he well knows that we are able to pay him whatever it may hereafter be held that we are bound to pay. Under any circumstances he cannot bring an action against the board for his fees incurred while he was their clerk. That was held in *Jones* v. *Corporation of Carmarthen* (2).

BACON, V.C. :—

I am very sorry to have had such a case as this before me, because Mr. *Hemming*, on behalf of the late clerk of this local board, has relied on his (the clerk's) power to obstruct. To obstruct what? Why, to obstruct the discharge of public duties. The authorities that have been referred to do not seem to me to touch the case in the slightest degree. That on which Mr. *Hemming* most relied, of *Rex* v. *Sankey* (3), has nothing to do with it. That case was this: A town clerk, in his office of town clerk, becomes engaged in professional business for the corporation, and it was held you could not compel him to give up those papers, papers which had come to him in this way. That is not like this case. This is a contract from the beginning to the end, that on the condition of his being appointed town clerk he will perform all professional duties. That contract has never been departed from. There have been subsequent transactions by which the

(1) 9 W. R. 804. (2) 8 M. & W. 605. (3) 5 A. & E. 423.

local board have agreed to pay him money, and have paid him money to a considerable extent; but the contract is between these commissioners, who are intrusted with public duties, and who find it necessary to employ a clerk which the statute sanctions, and the clerk, who says, Take me into your service as clerk, and pay me the salary you stipulate, and I will do all your legal business. What has that to do with the relation of solicitor and client? It is the relation of master and servant, and not solicitor and client at all. Am I to say that when a man has entered into such a contract as that, and it comes to an end, he has a lien upon the papers of his master? His professional character has nothing to do with it. He cannot divide himself into two portions and say, In this place I was a solicitor, and in that a clerk. He agreed to become the clerk and to do the legal business, and he has done that from the time of his first hiring down to the present time. There are disputes which I do not mean to enter into in the slightest degree, and I express no kind of opinion upon them. I have nothing to do with the case of *Jones* v. *Corporation of Carmarthen* (1), or any other of the cases which have been cited. All I have to do with is the case before me, and the case before me is whether I am, in the terms of the notice of motion, bound at the instance of this public authority to direct that the "books, minute-book, books of account, rentals, maps, bills, receipts, vouchers, leases, and counterparts, secured muniments, pleadings, affidavits, exhibits, briefs, office copies, records, and papers of or belonging to the Plaintiffs, or relating to the property thereof," should be given up. Why should I refuse to make an order in that form? I am not ordering anything that belongs to Mr. *Eldridge* to be parted with. The property belongs to the municipal corporation, and it is not in their power or right to part with it. They must put them in the hands of a clerk, whom they hire on the terms mentioned in the contract, in order that he may do the business which they personally cannot do; and because he has acted as a solicitor, does that diminish his original obligation to restore the property when required? I cannot think that there is anything of the sort. The injunction to restrain him from parting with it seems a matter of course.

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(1) 8 M. & W. 605.

The affidavits which have been read, and which contain a great deal of matter which I do not touch upon in the slightest degree, do not present any distinct statement of what documents it is said belong to the corporation which he is willing to relinquish, and what belong to him in his character of solicitor; but this is not the time to make the distinction, and therefore I must take it, in the absence of any statement by him, that all the law papers (I use that phrase in order that it may be understood) in his hands under the original hiring and employment are the property of and belong to the corporation. Why should he not restore them? The use which is required to be made of them is for this pending appeal, under which, in the terms of the contract, he being their hired clerk, also acted as their solicitor, and there may be something due to him in respect of that, which I do not interfere with in the slightest degree. He has carried on and conducted to a certain point an appeal which is now about to be heard in the Court of Appeal, and he says he will exercise an obstructive power so as to prevent this public body from discharging their public duties. That is not to be endured. It is not at all like any of the cases which have been referred to. It does not touch the principle established in *Lord* v. *Wormleighton* (1), which is perfectly good law. He has been discharged, but there is not an end of the consequences of his contract. When he was discharged the right to strip him of everything he had belonging to the corporation existed, and the right exists still. I make the order I am asked for in the very terms of the notice of motion,—the documents of and belonging to the corporation,—and leave Mr. *Eldridge*, if he can at some convenient opportunity when a motion is made for committing him, to shew there were some things that never belonged to the corporation. That I have nothing to do with, but in the mean time common sense and common justice require that he should produce (I do not say hand over, for I will not disturb his lien, if he has one) to the clerk who now has the conduct of the appeal all the papers which are mentioned in the third part of this notice of motion, that is to say, briefs, affidavits, and copies of documents, pleadings, and papers necessary to enable the present town clerk to instruct counsel, and to do all necessary acts for the purpose of prosecuting the appeal which Mr. *Eldridge* took in hand, and begun, and has left.

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(1) Jac. 580.

From this decision, so far as it related to the law papers relating to the action against the *Cottingham* Local Board, the Defendant appealed. The appeal was heard by special leave on the 25th of July, 1879.

Hemming, Q.C., and *H. Green*, for the Appellant:—

By the order of the Vice-Chancellor the Appellant will be deprived of the whole benefit of his lien. This cannot be done on an interlocutory motion; it must be done, if at all, at the trial of the action. We admit that as clerk to the board the Defendant has no lien on the papers belonging to the board, but he was also the solicitor of the board in the action against the *Cottingham* Local Board and he claims a lien on the papers in that suit. There is no foundation for the opinion expressed by the Vice-Chancellor, that the solicitor of a public body would not be permitted to assert his lien against them, lest he should obstruct the public business. The right of a town clerk to a lien on papers for work done as a solicitor was distinctly recognised in *Rex* v. *Sankey* (1). The Plaintiffs' answer to our claim is that there was no valid retainer because it was not under seal; but there was a resolution appointing him solicitor, and the board adopted the suit and took the benefit of his work. They cannot now repudiate his retainer.

[JAMES, L.J.:—If Mr. *Eldridge* was not properly authorized to act as the Plaintiffs' solicitor in the action, might not all the proceedings be taken off the file?

COTTON, L.J.:—The order obtained by the Plaintiffs to change their solicitor admits that the Defendant was previously their solicitor.]

If the Defendant was not the solicitor of the Plaintiffs in the action, the papers do not belong to the Plaintiffs at all, but are the Defendant's own property.

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(1) 5 A. & E. 423.

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1879

NEWINGTON LOCAL BOARD v. ELDRIDGE.

Sir *H. Jackson*, Q.C., and *Crossley*, for the Plaintiffs:—

The Plaintiffs were entitled to all the Defendant's services as clerk; by the original contract he was to do the legal as well as the ordinary business of the board in consideration of his salary. The Plaintiffs were of course to pay his expenses out of pocket, but it is unconscientious in him to claim a lien on the property for the purpose of being paid more than he bargained for. Therefore the Plaintiffs may fairly take advantage of the fact that his retainer was not under seal. *Arnold* v. *Corporation of Poole* (1) is still good law.

[BRETT, L.J.:—If a person were to say that he was appointed solicitor to a corporation and were to bring an action against them for employing some one else, I suppose he would have to shew his appointment under seal. But if he had conducted a suit for them as their attorney and brought an action for his costs, would it be necessary to prove an appointment under seal?]

We say that all the work was done by the Defendant as clerk to the Plaintiffs as a public body, and that is the ground of our claim for a mandamus.

[JAMES, L.J.:—That is the very question to be tried. You cannot have the mandamus at once. The question of lien must be kept open till the trial of the action. Mr. *Hemming*, are you prepared to give up the papers on having the amount of your claim paid into Court to abide the decision at the hearing?]

Hemming, Q.C.:—Yes, we offered that from the first. We estimate the amount of our bill, when taxed, at £1000.

THE COURT made an order that £1000 should be paid into Court by the Plaintiffs, Mr. *Eldridge* to have the same lien (if any) upon the fund in Court as he would have had upon the papers; and on payment of the money into Court all the papers were to be given up to the Plaintiffs. The Plaintiffs to pay the costs of the appeal.

Solicitors for Plaintiffs: *Cunliffe, Beaumont, & Davenport.*
Solicitor for Defendant: *C. A. Wright.*

(1) 4 Man. & G. 860.

RICHMOND *v.* WHITE.

[1876 R. 235.]

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1879
July 26.

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— 368
15 Ch D 18
22 Ch D 6

Executor—Retainer—Payment into Court.

In an action by residuary legatees against an executor to administer an insolvent estate, after the usual administration judgment had been given an order was made in Chambers, on the application of the Plaintiffs and in the presence of the executor, pursuant to which an insurance company paid certain policy moneys which formed part of the assets of the testator into Court to the credit of the cause.

Upon the further consideration of the action, the executor, who was a creditor of the testator, claimed to retain his own debt out of the moneys so paid in, in priority to the costs of the action and the debts of the other creditors:—

Held (reversing the decision of *Hall*, V.C.), that the payment into Court was in substance a payment by the executor, and that he was entitled to a right of retainer out of the fund.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

The action was brought by the infant residuary legatees under a will against the executor for administration of the estate. The ordinary administration decree was made and the estate proved to be insolvent.

Part of the testator's assets consisted of the moneys payable under a policy of assurance upon his own life, which moneys were subject to an equitable mortgage; and pursuant to an order made on the application of the Plaintiffs in Chambers, on which application the executor appeared, the insurance company paid off the equitable incumbrancer, and paid the balance of the policy money into Court to the credit of the action. The order contained no reservation of the executor's right of retainer.

On the cause coming on for further consideration, the executor, who was a creditor, claimed to retain his own debt out of the fund so paid into Court by the insurance company, in priority to the costs of the action and the debts of the other creditors.

The Vice-Chancellor having refused to allow the claim, the executor appealed from his decision.

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(1) 10 Ch. D. 727.

W. Pearson, Q.C., and *Macnaghten*, for the Appellant:—

The executor had a right to recover the policy money from the insurance company, and if he had done so he would have had a clear right of retainer. The Court in administering an estate does not alter the rights of the parties *inter se*. If the executor had himself paid the money into Court he would not have lost his right of retainer: *Chissum* v. *Dewes* (1); and it can make no difference that he consented to its being paid in by the company.

Hastings, Q.C., and *Phear*, for the Plaintiffs:—

The right of retainer by an executor is an old legal doctrine, and arose out of the fact that an executor could not bring an action against himself for his debt; but it has always been regarded with jealousy by the Court, and it ought not to be extended. It has always been confined to legal assets, and to such of them as actually come into his hands: *Williams* on Executors (2); *Roskelly* v. *Godolphin* (3); *Marriot* v. *Thompson* (4). In the present case the money never passed through the executor's hands. When it was paid into Court he ought to have claimed his right, and the Court would have reserved it, if it had considered him entitled to it; but now it is too late. If a receiver is appointed of the assets of a testator the executor cannot claim a right of retainer in the assets got in by him.

[COTTON, L.J.:—If the receiver is appointed with the consent of the executor, the executor waives his right of retainer; if he is appointed hostilely, it would be because the executor had acted improperly.]

The executor is not a preferential creditor as to the legal assets, and unless he comes within the strict rule there is no reason why he should be favoured by the Court.

JAMES, L.J.:—

Having regard to the form of the order in this case, I am of opinion that the executor has not lost his right of retainer in this case. The Vice-Chancellor says that the right of retainer is one

(1) 5 Russ. 29.
(2) 6th Ed. p. 973.
(3) Sir T. Raym. 483.
(4) Willes, 186.

which he was not disposed to extend. But here the Court has nothing to do with extending or curtailing the right; it is a well-established right of the executor which the Court has to apply to the facts of this case without allowing any technicality to defeat it.

An executor has a right to retain his debt out of the assets in his hands. Beyond all question if the policy money in this case had been paid to the Defendant, which it ought to have been, because he had the clear legal right to recover it from the insurance company, he would have received it with the right to retain his own debt out of it. But the insurance company had notice from the Plaintiffs not to pay it to him, and then an application was made in Chambers, and it was said, "What is the use of the money being paid to the executor, and then paid by him into Court?" It could only be paid in by the executor or in his presence, because he alone could give a receipt to the insurance company, but the trouble and expense of a double order were avoided by its being paid at once into Court. That must have been without prejudice to the right of the executor, just as much as if the form had been gone through of the money being paid to him and then paid by him into Court. I think that the Vice-Chancellor's order must be reversed.

Brett, L.J.:—

I am of the same opinion.

Cotton, L.J.:—

I am also of the same opinion. The foundation of the Defendant's claim is his right of retainer as executor, which is an admitted legal right, and the question is whether that right has been taken away by what has taken place in the suit. The Vice-Chancellor says in his judgment, "The executor might have protected himself when the money was paid into Court," that is, as I understand it, the executor might have had a clause put in the order that the money was paid in without prejudice to his right of retainer. But I am opinion that the order must be read as if such a reservation had been contained in it. It was not for any fault of the executor that the money was paid into Court, but for the con-

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venience of the insurance company, that they might be discharged. The executor had a perfect right to recover the money from the insurance company, and he then might have paid it into Court the next day. The Court never allows an order for payment of money into Court to prejudice the rights of the person paying it in. We are not extending the doctrine of retainer by allowing it in this case, but merely giving the executor the same right as he would have had, if that had been done which ought to have been done.

The decision of the Vice-Chancellor must be reversed, and the Plaintiffs must pay the costs of the appeal.

Solicitors: *Russell, Son, & Scott*; *Pike & Son.*

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In re BLIGH.

Person of Unsound Mind not so found—Power of Chancery Division to appoint Guardian.

13 Ch. D. 773.

[illegible] 62 [illegible]

Although the Chancery Division has power, in the administration of the trusts of the property of a person of unsound mind not so found, to give directions for his maintenance, it has no jurisdiction to appoint a guardian of his person.

Vane v. *Vane* (1) questioned.

THIS was a petition by Mrs. *O'Connell* for an inquiry whether *Grace Bligh* was a person of unsound mind.

In the year 1877 an action had been brought in the Chancery Division in which *Grace Bligh*, described as a person of unsound mind, not so found by inquisition, by *Mary J. Nutting*, her next friend, as Plaintiff, and *W. B. O'Connell* and *G. Surman* were Defendants, for the administration of a fund of £5032 Consols and £1159 Reduced £3 per Cent. Annuities belonging to the Plaintiff. An order had been made in that action for the application of the income of her property for her maintenance, and by a further order, dated the 9th of July, 1878, *Mary Jane Nutting* and *H. M. Tuckwell*, M.D., were appointed guardians of the person of the

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(1) 2 Ch. D. 124.

Plaintiff during her life or until further order. Since that time Miss *Bligh* had been living under the care of *Mary Jane Nutting*.

Stallard appeared for the Petitioner.

Romer, for *Mary Jane Nutting*, objected to the inquiry, as likely to be injurious to the health of Miss *Bligh*, and also unnecessary, as her person and property were fully protected by the order made in the action in the Chancery Division.

[JAMES, L.J.:—Under what jurisdiction were the guardians appointed in the action?]

They were appointed by the Judge of the Chancery Division under the authority of *Vane* v. *Vane* (1).

JAMES, L.J.:—

I think an order for the usual inquiry ought to be made in this case. The Master will take care that it is conducted in such a way as not to distress the lady. There must be some mistake in the case cited as to the power of a Judge of the Chancery Division to appoint a guardian to a person of unsound mind. The Chancery Division often directs the income of the property of a person of unsound mind to be applied for his maintenance, but that is only by way of administering a trust. It has no power to appoint a guardian of his person.

COTTON, L.J.:—

I am of the same opinion. All that the Chancery Division can do is to authorize the income of a person of unsound mind to be applied for his maintenance so long as he lives under the care of a particular person who has charge of him. But it has no power to appoint such person his guardian.

BRETT, L.J., concurred.

Solicitors: *Saunders & Co.; Surman, Henley, & Co.*

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(1) 2 Ch. D. 124.

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C. J. B.
June 30.

C. A.
July 31.

Ex parte TAYLOR. *In re* GRASON.

Proof in Bankruptcy—Loan to Trader—Lender receiving Share of Profits—Partnership Law Amendment Act, 1865 (28 & 29 *Vict. c.* 86, *Bovill's Act*), *ss.* 1, 5—*Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 32, 41.

The effect of sect. 5 of *Bovill's Act* is to prevent the lender of money to a trader, on the terms of receiving a share of the profits of his business, from proving for the loan in the bankruptcy of the borrower in competition with any of his creditors—not merely those creditors whose debts were contracted in relation to the business in respect of which the loan was made, or while that business was being carried on—but any of the creditors who are entitled to prove in the bankruptcy.

Till all the other creditors have been paid in full, such a lender is not entitled to prove for any purpose whatever.

In 1871 a loan was made to a trader, on the terms of the lender receiving half the profits of the business. In 1872, the trader being then insolvent, assigned all his property to a trustee, on trust for sale, and out of the proceeds of sale to pay the lender a small sum, then to pay his creditors (other than the lender) in full, and afterwards to pay the lender the balance of his loan, with interest at 10 per cent. The lender was a party to this deed. The trustee realized the property, and paid the creditors (other than the lender) a dividend of 6*s.* in the pound. This exhausted the proceeds of sale, and the lender received nothing beyond the small payment made to him in the first instance. In 1875 all the creditors released the trustee, but they expressly reserved their rights against the trader. In 1879 the trader filed a liquidation petition:—

Held, that the arrangement of 1872 did not, under the circumstances, amount to a repayment of the loan and a relending of the money on new terms, and that, consequently, the lender could not prove in the liquidation in competition with the other creditors.

ON the 10th of July, 1871, *Joseph Taylor* advanced to *H. P. Grason*, who was then carrying on business as a merchant and commission agent at *Manchester*, the sum of £4500, and on the same day the following memorandum was signed by *Grason* and *Taylor*:—

"Memorandum that *Joseph Taylor*, Esq., has this day lent to me the sum of £4500, in consideration of which I hereby agree to allow him one half of the profits arising out of my business as a merchant and commission agent, carried on at 3, *Marsden Street, Manchester*; the said profits to be ascertained after deducting working expenses and losses, including also special arrangement of interest in the business to be paid to my manager Mr. *Joseph Rhodes;* all contracts entered into from this date shall be participated in by Mr. *Taylor*, and a proportionate interest in all existing contracts according to the use I have to make of the above loan. I also agree to sign an agreement which shall be prepared according to Act of Parliament whereby the lender is not considered a partner."

No further agreement was signed. Disputes arose between *Grason* and *Taylor*, and *Taylor*, being unable to obtain repayment of the £4500, on the 26th of November, 1872, filed a petition in bankruptcy against *Grason.* Immediately after the filing of the petition *Grason* paid £500 into the hands of the receiver appointed under the petition. The petition was afterwards dismissed, upon the terms of an agreement which were embodied in a deed dated the 24th of December, 1872.

By this deed, which was made between *Grason* of the first part, *J. E. Lees* of the second part, *Taylor* and *James Hinchcliffe* of the third part, and *Taylor* of the fourth part, *Grason* granted and assigned to *Lees*, his heirs, executors, administrators, and assigns, all and singular his estate and effects, real and personal (except certain property comprised in a deed of post-nuptial settlement dated the 25th of January, 1871, and the jewellery and wearing apparel of himself and his wife and children), upon trust to get in such parts of the same (including the £500 paid to the receiver) as should consist of money, and to convert the rest into money, and out of the £500 to pay certain costs, charges, and expenses, and to pay the residue of the £500, amounting to £268 8*s*. 10*d*., to *Taylor;* and to pay and divide the residue of the trust moneys (after payment of the costs and expenses of the trust) unto and among all the creditors of *Grason* (other than *Taylor*), rateably in proportion to the amount of their respective debts, until all such creditors should be fully paid and satisfied, and then to pay to *Taylor* so much of the residue of the trust moneys as would be sufficient to satisfy the balance of the £4500, with interest at the rate of 10 per cent. thereon or on so much thereof as should for the time being remain unpaid, from the date of the memorandum of the 10th of July, 1871, up to the respective days of payment, and to pay the residue (if any) of the trust moneys to *Grason.* The

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deed contained a covenant by *Taylor* with *Grason* that, so soon as the other creditors should have been paid in full and *Taylor* should have received 10*s.* in the pound on his debt of £4500, and should also have been paid interest on the debt, up to the time of payment of 10*s.* in the pound, at 10 per cent. per annum, he would execute to *Grason* a release from the balance of the £4500 then remaining owing, and from all interest in respect thereof.

The only creditor of *Grason* who executed, or was a party to this deed, was *Taylor*.

Taylor received the £268 8*s.* 10*d.*, but never received any other payment in respect of the £4500 and interest.

The trustee realized the property comprised in the deed, and divided the proceeds among the creditors other than *Taylor*, paying them thereby a dividend of 6*s.* 0¼*d.* in the pound.

On the 15th of March, 1875, a deed was executed by which *Taylor* and the other creditors released *Lees*, but expressly reserved their rights against *Grason*.

In the early part of the year 1877 *Grason* ceased to reside at *Manchester*, and went to live at *Barnsley*, where he commenced business as a dyer. He, however, retained his office at *Manchester* until the 24th of December, 1878, and occasionally transacted business there as a commission agent up to that date.

On the 16th of November, 1877, *Taylor* commenced an action against *Grason* to recover the £4500 and interest. On the 3rd of January, 1878, *Taylor* died, and the action was then continued by his widow and executrix. At the trial on the 22nd of July, 1878, judgment was given for the Plaintiff, but execution was stayed to enable the Defendant to appeal.

On the 4th of February, 1879, *Grason* filed a liquidation petition in the *Barnsley* County Court. In this petition he was described as "of the *Hope Dye Works, Barnsley*, dyer, trading under the style or firm of *Joseph Smith & Son*, and late of the city of *Manchester*, commission agent, trading under the style or firm of *H. P. Grason & Co.*"

At the first meeting of the creditors, held on the 25th of February, 1879, Mrs. *Taylor* tendered a proof for the judgment debt of £4500. The proof was objected to on the ground that "the debtor denies the claim *in toto*, and an appeal against the judg-

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ment is pending." Resolutions for a liquidation by arrangement were passed, the validity of which depended upon the admissibility of Mrs. *Taylor's* proof. If her proof ought to have been admittted the resolutions were not carried by the proper majority.

Notice of objections to the registration of the resolutions was given to the Registrar, and the hearing of the objections was adjourned until after the result of the appeal in the action should be known.

On the 7th of April, 1879, the appeal was heard and was dismissed.

The Court of Appeal held that the agreement of the 15th of July, 1871, did not make *Taylor* a partner with *Grason*, but that the transaction was a loan under *Bovill's Act;* that the deed of the 24th of December, 1872, was not an accord and satisfaction of the debt; and that sect. 5 of *Bovill's Act* was no bar to the action, because *Grason* had not become bankrupt when the action was commenced.

On the 18th of April, 1879, the Registrar decided that Mrs. *Taylor's* proof ought to have been admitted, and refused to register the resolutions.

The County Court Judge, on the 3rd of May, reversed the decision of the Registrar, and directed that the resolutions should be registered.

From this decision Mrs. *Taylor* appealed to the Chief Judge.

It was in evidence that *John Parr*, one of the creditors in 1872 of *Grason*, who received the dividend of 6*s.* 0¼*d.* in the pound, and executed the deed of the 15th of March, 1875, had recently recovered a judgment against *Grason* for the balance of his debt (amounting to about £30), and that he had proved upon that judgment in the liquidation proceedings.

The appeal was heard on the 30th of June, 1879.

Winslow, Q.C., and *R. T. Reid*, for the Appellant:—

The deed of the 15th of March, 1875, did not in terms release *Grason* from the claims of creditors other than *Taylor;* but it must be taken to have had that effect. It was a *cessio bonorum: Whitmore* v. *Turquand* (1). So that there are no remaining creditors of *Grason* with whom *Taylor's* estate can come into competition; and this is the result of the judgment of the Court of Appeal in *Taylor* v. *Grason.* The fact that *Grason* allowed judgment to go by default in *Parr's* action cannot affect *Taylor's* claim.

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(1) 3 D. F. & J. 107. 7 Jur NS 377

Bacon, C.J., observed that the Act of Parliament did not alter the relation of debtor and creditor as between principals—it only gave certain benefits to the creditors of a partnership business.

Aspland, for the debtor and some of the creditors:—

These resolutions ought to be registered. No proof can be admitted under such an agreement as this, whilst trade debts remain due which were contracted whilst it was in force: *Ex parte Mills* (1). So that it is not necessary to shew that the rights of the creditors of *Grason* are not extinguished, or rather that their remedies have not become barred. If it were necessary to shew this, the fact would sufficiently appear from the result of *Parr's* action. Their rights were saved in express terms by the deed of 1875.

Winslow, in reply:—

The difference between *Ex parte Mills* and the present case is this—that the business to which *Taylor* lent his money has long since come to an end, and been wound up. After December, 1872, *Taylor* could not have claimed profits had there been any. The creditors under this liquidation are creditors of the new business. The present proceedings amount in effect to a second bankruptcy.

Bacon, C.J.:—

This case goes very near the wind, no doubt, but I think that *Ex parte Mills* decides it. What are the facts? It is not in dispute that the original contract was such as to incur the mischief which the *Partnership Law Amendment Act* was intended to prevent. A loan of money upon the terms of receiving a share of the profits no longer constitutes a partnership, but, while there remains a tittle of the lender's money employed in the business, he is not to prove in competition with the other creditors for value.

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(1) Law Rep. 8 Ch. 569.

If there remains any one of those creditors whom it was the intention of the Act to protect against the claims of lenders of moneys employed in the business, the lender cannot prove in competition with that one who so remains. Here, in 1872, after proceedings in bankruptcy had been taken by *Taylor*, after *Taylor*, the lender, and *Grason*, the borrower, were at daggers drawn, an arrangement was come to by which *Grason* transferred practically the whole of his property to a trustee for the benefit of his creditors. That went on, in some way that is not distinctly explained, from 1872 to 1875. In 1875 the value of the property assigned or supposed to be assigned had been ascertained. That must have been so, because then a deed was executed by which all the creditors (*Parr* included) agreed (not to release *Grason;* there is no release of the original debts due from him) but to release the trustee, who had been employed in realizing the property, upon their getting 6*s.* in the pound; and the deed in express terms reserves all their other rights. Can it be said, then, that the same debts, the same liabilities, the same obligations under the statute, do not exist, notwithstanding that deed, now that *Grason* has become bankrupt again? *Parr*, one of those creditors, who has not released the bankrupt or his estate, but has only released the trustee, has recovered judgment in respect of his original debt. It comes, therefore, within the very words of the statute; and, although there may have been a new business carried on, and new debts contracted by the debtor, that does not in the slightest degree relieve him, or diminish the rights of the creditors. The subject was considered by Lord Justice *Mellish* in *Ex parte Mills.* He said (1)—referring to an argument that had been addressed to him—"It was urged, in answer, that the intention of the statute was to alter the law of partnership for the benefit of persons advancing money to traders, and that it cannot have been intended to put a person so advancing money in a worse position than if he had been a partner; and it was said that, if he had been a partner, and the accounts of the partnership had been settled, and all its debts paid, he could have proved against his former partner in competition with subsequent creditors, and that therefore the statute ought to be so construed as to

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(1) Law Rep. 8 Ch. 575.

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admit a proof in the present case. But it would require very strong reasons to convince me that I ought to depart from the words of the statute, which, as it seems to me, are quite clear. I am not sure that if the intention of the Legislature had been called to this precise point, it would have modified the enactment in the sense contended for by the Appellants." So that it cannot be said that the present case was not in the contemplation of the Court at the time when that judgment was pronounced. On the contrary; it is fairly and distinctly expressed, and clearly contemplated. Mr. *Winslow* points out that which did not exist in *Ex parte Mills* (1), but which does exist in the present case, that the business in respect of which the loan was made has been wound up, and all its assets distributed or realized for the benefit of the creditors so far as they would go. In *Ex parte Mills* there had been no such proceeding, but the same business was still carried on. But that cannot make any difference, having regard to the words of the statute. If the debt for which it is now sought to make a proof was contracted under circumstances to which the Act applies, that debt still exists; the relation of debtor and creditor still subsists notwithstanding the deeds of 1872 and 1875. And *Parr*, one of the creditors who were parties to the deed of 1875, now desires that the lender of this £4500 shall not be allowed to prove in competition with him, and, of course, with the other creditors. I think the judgment of the learned County Court Judge is quite right, considering especially the deed of 1875, and bearing in mind the fact that *Grason* is nowhere released, and that he owes his debts just as he always did. I think that the fact of his beginning a new business can make no difference whatever, and that *Taylor's* representative cannot be admitted to prove in competition with the other creditors.

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From this decision Mrs. *Taylor* appealed. The appeal was heard on the 31st of July, 1879.

Winslow, Q.C., and *R. T. Reid*, for the Appellant:—

Sect. 5 (2) of *Bovill's Act* postpones the lender of the money only to the creditors of that business in respect of which the loan was made, not to all the creditors of the borrower. At any rate the postponement is only to those debts of the borrower which were contracted while that particular business was being carried on. It must have been intended that the priority should be given only to the debts of those creditors who might have been misled into supposing that the lender was a partner with the borrower, those creditors who are dealing with the borrower at the time when interest varying with the profits, or a share of the profits, is to be paid to the lender. In the present case the business to which the loan was made was stopped long before the liquidation began; the liquidation is that of a new and distinct business. So far as appears, all the creditors of the old business are satisfied, except *Parr*, to whom about £30 remains due, and the present objection is not raised by him, but by some of the new creditors. Surely the new creditors have no right to raise the objection. *Taylor* had no claim against the profits of that business in respect of which they became creditors. The present case is not, as the Chief Judge thought, covered by *Ex parte Mills* (1), for there the borrower's business continued to be carried on after the agreement for the loan had been determined. The decision went only to this extent, that the lender could not prove for the loan, though all other debts of the borrower existing during the continuance of the agreement had been paid. And, whatever may have been the effect of sect. 5 of *Bovill's Act* originally, the effect of sect. 32 of the *Bankruptcy Act*, 1869, as construed in *Ex parte Pottinger* (2), is to put debts of a bankrupt arising out of his voluntary bonds or covenants on the same footing for the purpose of proof and receipt of dividends as debts for valuable consideration. Sect. 32 says that, with certain specified exceptions, all debts provable in the bankruptcy are to be paid *pari passu*. Sect 5 of *Bovill's Act* has, therefore, been in effect repealed. This construc-

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(1) Law Rep. 8 Ch. 569.

(2) Sect. 5 provides that "In the event of any such trader as aforesaid being adjudged a bankrupt . . . . or dying in insolvent circumstances, the lender of any such loan as aforesaid

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shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, ... until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

(1) Law Rep. 8 Ch. 569.

(2) 8 Ch. D. 621.

tion had not been given to sect. 32 at the time when *Ex parte Mills* (1) was decided.

[JAMES, L.J.:—The rule is that a special Act is not repealed by a subsequent general Act unless such a construction is absolutely necessary.]

But at any rate *Taylor's* position was altered by the deed of December, 1872. After that he was only entitled to 10 per cent. interest on his loan. He was no longer "the lender of any such loan" within the meaning of sect. 5. That section must be read with sect. 1, and, so reading it, "the lender of any such loan" must mean the lender of a loan on an agreement to receive a rate of interest varying with the profits or a share of the profits.

[BRETT, L.J.:—You have proved as a creditor under a judgment in respect of the original loan. According to your argument, the moment judgment is recovered the lender ceases to be a creditor entitled to receive interest varying with the profits or a share of the profits.]

The question is whether he is the lender of such a loan at the time of the bankruptcy.

[COTTON, L.J.:—The circumstances of this case preclude the notion that there was a payment of the loan in December, 1872, and then a re-lending of the money, for *Grason* was then insolvent.]

But, at any rate, the present question is only as to the right to prove; not as to the right to receive dividends. The other debts may be paid in full, and the Appellant ought to be allowed to prove, even if she can receive no dividend till the other creditors for value have been paid in full. Under sect. 31 of the *Bankruptcy Act*, 1869, all future and contingent liabilities of a bankrupt (not arising out of tort) may be proved. And those creditors who are now admitted to prove will have the power to appoint a trustee and to give the debtor his discharge, and the Appellant, if she is excluded, will have no voice in the matter.

Aspland, for the debtor and some of his creditors, was called upon only on the question whether the Appellant should be allowed to prove so as to be able to vote:—

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(1) Law Rep. 8 Ch. 569.

This point is concluded by *Ex parte Mills* (1). It was taken in the argument there and was overruled. The affidavit of *Grason* shews that the assets will not be enough to satisfy the other creditors. If the Appellant's proof is admitted she can outvote all the other creditors. Proof is one mode of "recovering" a debt.

[BRETT, L.J.:—Could not an action be maintained for the debt if it is not provable in bankruptcy?]

Sect. 5 of *Bovill's Act* would be an answer to an action.

[JAMES, L.J.:—I am disposed to think that such a creditor could maintain an administration action, and could prove his debt, because, until the accounts had been taken, it would not be known whether the estate was insolvent.]

But, in the present case, the foundation of the proceedings, the liquidation petition, contains a declaration of insolvency. A partner is not allowed to prove against the separate estate of his co-partner, and in such a case the proof would not be admitted provisionally. It would not be admitted at all until the joint debts had been paid in full: *Ex parte Moore* (2); *Ex parte Bass* (3); *Ex parte Gordon* (4). By sect. 41 of the *Bankruptcy Act*, 1869, the trustee is bound to pay dividends to the creditors who have proved debts which are provable.

Winslow, in reply:—

The debt must be provable in some way; it is only postponed by sect. 5 of *Bovill's Act*. *Ex parte Sheil* (5) shews that the word "recover" will be construed strictly. Sect. 31 of the *Bankruptcy Act*, 1869, gives a very large right of proof. The present question was not raised in *Ex parte Gordon*. *Ex parte Moore* was decided under the Act 49 Geo. 3, c. 121, before which a partner could not have proved at all. *Ex parte Bass* merely followed *Ex parte Moore*. If this is not a provable debt the Appellant may seize any property of the debtor. Sect. 12 of the *Bankruptcy Act*, 1869, only applies in respect of provable debts.

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(1) Law Rep. 8 Ch. 569.

(2) 2 Gly. & J. 166.

(3) 36 L. J. (Bkcy.) 39.

(4) Law Rep. 10 Ch. 160.

(5) 4 Ch. D. 789.

[JAMES, L.J.:—She could not take the trustee's property.]

She might take after-acquired property if the trustee had not claimed it.

COTTON, L.J.:—

Cotton, L.J.

There are two questions; first, whether the Appellant can prove so as to receive dividends in competition with the other creditors; and, secondly, if she cannot, whether she can prove at all at present. On the first point, which is the substantial point in the case, I have no doubt at all, and we stopped the Respondents on it. Money was advanced in 1871 by *Taylor* to *Grason*, on the terms that he should receive a share of the profits of *Grason's* business in respect of the loan. There was afterwards a deed of arrangement made in 1872, and subsequently *Taylor* or his representative recovered judgment for the amount of the original loan. Now *Grason* has filed a liquidation petition, and the question is, whether or not in that liquidation *Taylor's* representative can come in with the other creditors and receive a dividend in respect of the judgment debt or in respect of the original loan. The only question we have to consider is, whether or not, having regard to the terms of the Act 28 & 29 Vict. c. 86, she is prevented from so coming in. Undoubtedly, the original advance was by way of a loan coming within sect. 1 of that Act, and all, therefore, that we have to consider is this, what is the effect of sect. 5, having regard to what has taken place? The provisions of that section are clear, namely, that, "in the event of any such trader as aforesaid" (that is, a trader who has received an advance of money on the terms mentioned in sect. 1) "being adjudged a bankrupt . . . the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan . . . until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied." The question is, whether or not the latter part of the section prevents the representative of Mr. *Taylor* from coming in in competition with the other creditors. The words seem to be clear, and not to confine the restriction to coming in in competition with creditors in respect of that particular trade, or creditors whose debts are contracted while that trade is going on. The words are general—that no lender of any such loan shall be entitled to recover until the claims of the other creditors of the trader for valuable consideration have been satisfied. They are unambiguous words, and I do not see how, if the case came before us without any prior decision, we could modify or qualify this express provision of the Act. Undoubtedly, it may produce the result that such a lender stands in a worse position than if he had been a partner. But the Act was intended to give a benefit or a supposed benefit to persons making loans on these terms, and as regards all those who do make loans on these terms it contains this provision. It is impossible, I think, to introduce into it any such qualification as has been suggested, that it only applies where there are any unpaid creditors of the business to which the loan was made, or any creditors whose debts were incurred during the carrying on of that business. There are no such words of qualification in the Act, its words are perfectly general, and the only reasonable construction of them, not being deterred from the fair construction by the consequences in certain cases, is "till all the other creditors for value who can come in in the bankruptcy or liquidation proceedings, or in the administration of the deceased's estate, have been satisfied."

It was, however, said, and this was the principal argument of Mr. *Reid*, that it is only "the lender of any such loan" who is disqualified, that it is only in respect of such loan that the disqualification arises. As I understand the argument, it is this, that you cannot say that the Appellant is the lender of such a loan, or that she seeks to recover in respect of such a loan, because in 1872 there was a deed of arrangement by which the terms of the loan were altered, and the loan, which was originally made on the terms of the lender receiving a share of profits, was altered in this way, that from that time he was to receive no share of the profits, but interest at 10 per cent.

It is unnecessary in the present case to consider what would be the effect of an agreement which, construed fairly, would in substance be a repaying by the borrower and then a lending again on new terms. Of course a transaction which is not in fact a repaying of money and a relending of it, cannot be that in effect when the circumstances under which the transaction occurs are such as

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to negative the possibility of repayment by the borrower and relending on new terms. Of course that is entirely out of the question here, because the deed of 1872 assumed that the borrower was unable to pay, and was in fact a deed of arrangement whereby provision was made for payment of the other creditors in the first instance, and afterwards of *Taylor*, out of the balance of the estate, with interest at 10 per cent., which payment was never made. It is impossible, in my opinion, to treat that as a repayment by the borrower and a relending on fresh terms. It was simply this, that there being no profits, and there being practically an insolvency of the borrower, there was a provision for repaying the original loan in a certain way, if there were assets, and our decision in the Court of Appeal at *Westminster* was that, as there never was anything paid to *Taylor* as contemplated by that deed, there was no release of the debt, and he was entitled to retain his judgment. We cannot, therefore, consider the claim which is now made as made in respect of anything but the original loan, and the words of the Act, "the lender of any such loan," cannot be considered as meaning a man who at the time of the insolvency is a lender. Of course, he has lent the money long before. The question really must be whether the words "the lender of any such loan" are not a mere description of the person by reference. If it could be shewn that the original loan had been entirely put an end to, and that there had been an entirely new transaction, a separate lending on different terms, that, of course, would be a very different case. Here the claim is really made in respect of the original loan, a loan which was made on the terms mentioned in sect. 1 of the Act. Therefore, by the express words of sect. 5, the Appellant is not entitled to recover anything, till the other creditors for value, that is, all the other creditors for value who can come in and prove in the liquidation proceedings, are paid and satisfied. So far as I can see, the express point was decided by Lord Justice *Mellish* in *Ex parte Mills* (1).

Then comes the other question, whether, if the claimant cannot come in and receive dividends in competition with the other creditors, she is, under the circumstances, entitled to prove. Upon that point we heard the Respondents, but I think we have all arrived at the conclusion that she is not at the present time entitled to prove, and that is all which it is necessary now to decide. If all the other creditors are paid, then possibly she may be able to come in and prove under these proceedings, but at the present time she is not entitled to do so. This point also seems really to have been decided by Lord Justice *Mellish* in *Ex parte Mills* (1). It having been apparently raised in argument, he did decide that a person standing in the same position as the present Appellant was not entitled in any way to come in and prove. We have, no doubt, decided that debts proved, even if they are voluntary debts, are entitled to receive dividends rateably with the other debts. And although the words of sect. 5 are not very apt as applicable to the circumstances with which it purports to deal, I think we ought to give effect to it in this way, holding that a creditor who has lent his money on these terms, not being entitled to recover until all the other creditors are paid, is not, until those creditors are paid, entitled to come in and prove so as to give him a right under the *Bankruptcy Act* to a distribution rateably with the other creditors who have already proved. Therefore we must dismiss this appeal. In our opinion, until the other creditors of the debtor have been satisfied, the Appellant is not entitled to come in and prove.

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(1) Law Rep. 8 Ch. 569.

JAMES, L.J.:—

The appeal will be dismissed with costs.

BRETT, L.J., concurred.

Solicitors for Appellant: *Lambert, Petch, & Shakespear*, agents for *H. Snowdon, Leeds.*

Solicitors for Respondents: *Wilkinson & Son*, agents for *Dibb, Raley, & Clegg, Barnsley.*

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(1) Law Rep. 8 Ch. 569.

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Ex parte WATSON. *In re* ROBERTS.

Undischarged Bankrupt—Second Adjudication of Bankruptcy—Validity.

An adjudication of bankruptcy against a debtor who has not obtained his discharge under a previous adjudication and has been allowed by the trustee to resume business is not void.

Morgan v. *Knight* (1) followed.

Ex parte Sydney (2) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

J. R. Roberts, a potato salesman, was adjudicated a bankrupt on the 12th of October, 1871. *James Davenport*, a potato merchant, was appointed trustee in the bankruptcy. The bankrupt did not obtain an order of discharge, and no dividend was paid to his creditors. Some time after the adjudication was made the bankrupt commenced business again as a potato salesman, and continued to carry it on until December, 1878. On the 27th of January, 1879, he filed a liquidation petition. The creditors resolved to accept a composition of 1*s.* 6*d.* in the pound, but the Registrar, on the 28th of March, refused to register the resolutions, on the ground that the debtor had not obtained his discharge under the bankruptcy of 1871. A bankruptcy petition was then presented against *Roberts* by Messrs. *Craig & Harrison*, who alleged themselves to be creditors for £137 15*s.*, the petition being founded on the act of bankruptcy committed by the filing of the liquidation petition. *Roberts* signed a consent to an immediate adjudication, and an adjudication was made against him on the 4th of April. An appeal against the adjudication was presented by four creditors, *Watson & Co.*, *George Doo*, *Walter Ellis*, and *Louis Wolfers*, who alleged that they were persons aggrieved by the adjudication. *Watson & Co.* had, on the 21st of February, 1879, recovered judgment against *Roberts* for a debt of £88 13*s.* 9*d.* and costs, and had levied execution under the judgment. A son of *Roberts* claimed the goods which were seized under the execution, and an interpleader issue was directed to try the right to the goods, and £95 was paid into Court by the debtor. The issue was, on the 27th of June, found in favour of *Watson & Co.* *Doo* was a creditor for £20, who had recovered judgment against *Roberts* on the 2nd of April, 1879, and had levied execution. *Ellis* was a creditor for £40. *Wolfers* was a creditor for £75, who had proved his debt under the bankruptcy of 1871. *Roberts* made an affidavit, in which he stated that he recommenced his business after the adjudication of 1871, with the knowledge and consent of *Davenport*, the trustee in that bankruptcy, and that on several occasions he bought goods from him for resale. *Roberts* also said that the committee of inspection and many of his principal creditors knew that he was doing business again. He also said that *Davenport* did not claim the assets under the second bankruptcy. These statements were not contradicted. When the notice of appeal was given the bankruptcy of 1871 was still unclosed and the bankrupt still undischarged. The trustee under the second bankruptcy had made a claim to the sum paid into Court in the interpleader issue.

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(1) 15 C. B. (N.S.) 669.

(2) Law Rep. 10 Ch. 208.

Winslow, Q.C., and *Ringwood*, for the Appellants:—

The Appellants are all aggrieved by the adjudication. *Wolfers*, the old creditor, is aggrieved, because the second adjudication affects to vest after-acquired property of the bankrupt in the second trustee, whereas it is really by the *Bankruptcy Act* vested in the first trustee. The new creditors who have levied execution are aggrieved, because the adjudication interferes with their rights under their executions. And the other new creditor is aggrieved, because the adjudication prevents his having any remedy against the property or person of the bankrupt except under the *Bankruptcy Act.* So long as the adjudication stands it is conclusive against the Appellants: *Ex parte Learoyd* (1). And, being aggrieved by the adjudication, the Appellants are entitled to appeal against it: *Bankruptcy Act*, 1869, s. 71; *In re Ellis* (2). A debtor whose creditors have agreed to a composition, cannot, while the composition is still existing and capable of being enforced, institute fresh proceedings for liquidation or composition:

(1) 10 Ch. D. 3.

(2) 2 Ch. D. 229, 797.

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Ex parte Sydney (1); *Ex parte Russell* (2); and the same principle applies to a second adjudication of bankruptcy. In liquidation the debtor's assets are distributed in the same way as in bankruptcy.

[JAMES, L.J.:—*Ex parte Sydney* was a decision that a man who was not *sui juris* could not institute fresh proceedings for liquidation or composition; it was not a decision that bankruptcy proceedings could not be taken against him.]

In *Ex parte Sydney* your Lordship said (3): "The same principle applies equally to cases of bankruptcy, liquidation, and composition. Any interference with pending proceedings in either case can only take place with the assistance of the Court."

[*E. Cooper Willis*, for the petitioning creditor:—It was decided in *Morgan* v. *Knight* (4) that an adjudication against an uncertificated bankrupt was not void.]

That decision was before the present *Bankruptcy Act*, sect. 12 of which is much more stringent than any provision of the *Bankruptcy Act* then in force in preventing a creditor from taking any proceedings against a bankrupt. In *Martin* v. *O'Hara* (5) it was held that a second commission against a bankrupt, pending a former under which he had not obtained his certificate, was void. And the same view was taken in *Till* v. *Wilson* (6).

E. Cooper Willis, and *Holmes Poulter*, for the petitioning creditor, were not heard.

JAMES, L.J :—

The point was really setttled by *Morgan* v. *Knight*, and we can only follow that decision. If an undischarged bankrupt is allowed by his trustee to carry on business again, and acquire property and contract new debts, the only thing which the new creditors can do is to obtain a new adjudication against him. Such an adjudication is not void, it is only voidable by the old trustee under certain circumstances. The creditors under the

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(1) Law Rep. 10 Ch. 208.
(2) Ibid. 255.
(3) Ibid. 210.
(4) 15 C. B. (N.S.) 669.
(5) Cowp. 823.
(6) 7 B. & C. 684.

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first bankruptcy can come in under the second and take their share of the assets.

BRETT, L.J.:—

Morgan v. *Knight* (1) appears to me to be a decision that the second bankruptcy may be effectual.

COTTON, L.J., concurred.

Appeal dismissed with costs.

Solicitor for Appellants: *W. Royle.*
Solicitor for Respondent: *G. H. Finch.*

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[1877 L. 42.]

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May 13, 14, 15, 20.

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Feb. 21, 22; *April* 23.

19 Ch D 5
10 QBD 2

Lee Navigation—Towing-path—Rights of adjacent Owners—Form of Defence—Costs of Shorthand Notes.

In an action by the Plaintiffs, who were conservators of the River *Lee* Navigation, to restrain the Defendant, who was the owner of property adjoining the towing-path, from using such towing-path for the passage of horses and carts and the carriage of goods and merchandise:—

Held, that, by the various Acts of Parliament under which the River *Lee* was constructed and preserved, the Plaintiffs did not acquire the freehold of the land forming the towing-path, which remained in the original owners, nor any easement over it; but only the right and the duty to keep it in a fit state for the public to use as a towing-path. But *held*, that by reason of this right and duty the Plaintiffs were entitled to an injunction to restrain the Defendant from so using the towing-path as to interfere with its use by the public for the purposes of the navigation.

The judgment of *Malins*, V.C., varied.

Per Malins, V.C.: A Defendant ought not to deny by his statement of defence plain and acknowledged facts, which it is neither to his interest nor in his power to disprove.

Where shorthand notes of evidence are essential to the proper hearing of the case, the costs of such notes will be allowed.

Judgmt of C.A. app affd 6 App Cas 685 H.L.

THIS was an action brought by the Plaintiffs, as Conservators of the River *Lee* Navigation, extending from *Hertford* to *London*, claiming an injunction to restrain the Defendant, *Reuben Button*, who was the owner of land adjoining the towing-path for an extent of about 350 yards, in the parish of *Tottenham*, from drawing or placing any horses, carts, waggons, or other vehicles, upon or along the footway or towing-path connected with the River *Lee* Navigation, or from in any wise damaging or obstructing the said footway or towing-path, or using the same otherwise than as a footway, or in any manner inconsistent with the free and convenient navigation of the said river. And the Plaintiffs claimed damages, and to have the costs of the action paid by the Defendant.

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(1) 15 C. B. (N.S.) 669.

The River *Lee* Navigation was originally formed in the year 1570, under the powers of an Act of Parliament passed in the 13th year of Queen *Elizabeth*. By that Act the mayor, commonalty, and citizens of *London*, were constituted the trustees and governors of the navigation, and it was provided that the trustees and their successors for ever should have the ground therein set out along the whole length of the navigation, for such composition as they should make with the owners and occupiers of the soil and ground.

Several other Acts of Parliament were passed previous to the 7 Geo. 3, c. 51. By that Act a number of persons were appointed trustees for extending, improving, and maintaining the navigation of the River *Lee*, and, amongst other things, to set out and make towing-paths or haling-ways upon any of the lands or grounds aforesaid, for towing or drawing with men, or horses, or other cattle, boats or other vessels. The 2nd section provided for making compensation to all persons for the damages they might sustain from the carrying this Act into execution, and the 5th section gave power to the trustees to contract or agree with the owners or proprietors of, and persons interested in, any messuages, weirs, turnpikes, locks, tenements, or hereditaments other than mills, which the trustees should adjudge necessary, convenient, or proper to become seised or possessed of, to be pulled down, destroyed, cut, altered, removed, or otherwise made use of for the purpose of the Act, or for the purchase thereof at such price or prices, either by way of a sum or sums of money in gross, or of annual rent or rents, as to the trustees should seem reasonable. By the 69th section provision was made for the navigation being free to the public, together with the use of the towing-paths and all other necessary and convenient liberties for navigating the river without any obstruction or hindrance from any person, but to be subject to such tolls as the trustees should determine upon, and subject to the orders and by-laws to be from time to time made by the trustees; and by the 103rd section any person who wilfully damaged or destroyed any banks or other works erected or made for the purpose of the navigation was to be liable to certain penalties. The 110th section provided that nothing in the Act should be construed as obstructing or hindering the lord of any manor, or the owners of any lands or grounds lying on or near the banks of the river, from making or erecting any warehouses or other buildings on the banks of the river in their own lands.

In 1767 the trustees of the river were desirous of improving the navigation, and for that purpose they called in the assistance of eminent engineers, and the consequence was that a large sum of money was raised for the purpose of altering the course of the river at particular places, and adapting the towing-path to the alteration, and the navigation having been improved, and the traffic having greatly increased, another Act of Parliament was passed in 1868, being the Act 31 & 32 Vict. c. cliv. By that Act the powers of the old trustees were transferred to and vested in a new body of thirteen conservators, representing the various interests concerned, who were to exercise all the powers of the old trustees, and to make by-laws from time to time for regulating and enforcing the maintenance, construction, erection of landing-places, piers, wharfs, and other works and conveniences on the banks of the navigable part of the river, and for prohibiting the construction of any works which would impede, obstruct, injure, or interfere with the flow of the water of the navigation, and the 126th section enacted that by-laws made under the Act and allowed by Her Majesty in Council should have the same validity and effect as if they were enacted by Parliament.

In pursuance of this last power, by-laws had been passed providing that no person should allow any horses or cattle to stray or trespass upon the towing-path or banks of the navigation, and that no person should place any obstruction in the waters of the

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navigation, or upon any of the towing-paths or banks belonging to the board, without permission in writing obtained from the board.

Evidence was given *vivâ voce* in Court, and a number of witnesses were examined, who proved that the towing-paths had been set out by metes and bounds and separated by hedges, rails, or other plain demarcations from the adjoining land, and that such demarcations had existed in the state in which they now were for above sixty years, and in particular that the land now owned by the Defendant was separated from the towing-path by sufficient fences, and that there were two openings in the fences to allow of access to the river. It was further proved that the towing-path had never been used by the Defendant's predecessors for horses, cattle, carts, or carriages, or for any other purpose than as a footway, and that no claim had been set up to such user of the towing-path by any person previous to the claim now made by the Defendant. The property now in the possession of the Defendant, and called the *Craven Park* estate, was purchased by him in the year 1871 from Mr. *Samuel Morley*, who purchased it from the trustees of Mr. *Craven*, who died in 1854. There was evidence that a rent had been paid to the different owners of the *Craven Park* estate by the Plaintiffs or their predecessors down to the year 1835, but since that period, now forty-three years ago, no rent whatever had been paid in respect of the towing-path.

Since Mr. *Button* had purchased the property, he had commenced using the soil for the purpose of making bricks, and he had lately used the towing-path in front of his own property for the purpose of carting away his bricks made on the ground adjoining the towing-path. The evidence went to shew that the effect of this was to cut up and destroy the towing-path and to interfere very materially with the free and convenient use of the towing-path for the purpose of the navigation. The Defendant also claimed to use, and had occasionally used, the towing-path in front of the land of other landowners, and in particular of a Mr. *Foster*, but there was no evidence of such user having interferred with the use of the towing-path by the public. A correspondence between the Plaintiffs and the Defendant had taken place on the subject, in which the Defendant had been warned to discontinue his use of the towing-path. The Defendant declined to accede to the Plaintiffs' requirements, and he alleged that he and his predecessors in title of the *Craven Park* estate had always had the soil of the towing-path vested in them, and he did not admit that the Plaintiffs had any easement or right in, over, or upon the portion of the *Craven Park* estate which was referred to as the towing-path; but even if they had acquired any such easement or right, they were not entitled to the exclusive use thereof, and had no authority to prevent the towing-path from being used by all persons, and especially by the owners of the *Craven Park* estate, for all lawful purposes, including therein the carrying along the towing-path, by carts, carriages, waggons, and other conveyances, all lawful ware, merchandise, goods, and materials.

The action came on for trial before Vice-Chancellor *Malins* on the 13th of May, 1878.

J. Pearson, Q.C., *Bond Coxe*, and *Romer*, for the Plaintiffs:—

Our contention is that the present Conservators of the River *Lee* Navigation are owners in fee simple of the entire soil of the river, and the towing-path throughout the whole length of the navigation from *Hertford* to *London*. When the formation of the river was first authorized in the thirteenth year of Queen *Elizabeth*, there was power given to the trustees to make compensation to the landowners for the damage they should sustain, and by the 7 Geo. 3, c. 51, they had power to take land for the construction of towing-paths adjoining the river, and to compensate the owners of such land either by the payment of a sum in gross or by a rent. By those Acts we contend that the trustees had power to take the land in perpetuity, and that they did take the land, and did acquire a fee simple in the whole of the property. If there was no formal conveyance of this land for the construction of towing-paths, still we have acquired a title to it by actual user for forty years. There is evidence that no rent has been paid to the Defendant's predecessors, or any person in possession of the *Craven Park* estate, for at least forty-three years; and it must be presumed that either compensation was paid in a gross sum or that any right which might have been claimed has been given up. If the fee simple was not acquired, still, by the various Acts passed from time to time, and by the by-laws passed under the powers of those Acts, the trustees had the full and entire control over the towing-paths, and might exclude every person from using them for the passage of horses, cattle, carts, or other carriages. The contention of the Defendant is entirely inconsistent with the free use by the Plaintiffs of the towing-paths for the purpose of the navigation. It would be impossible to use the towing-paths for the barge-horses if it was interfered with by the Defendant and other owners of the adjoining lands for carting bricks and other materials. Whether the Plaintiffs have the freehold or only an easement, they have a right to the assistance of the Court in protecting their rights.

That there may be an appropriation of a towing-path or other public road to a particular purpose was settled by the case of *Winch* v. *Conservators of the River Thames* (1); and that it has been so appropriated by the various Acts of Parliament connected with the formation of this river can admit of no doubt.

There is also evidence that no claim such as the Defendant now sets up has ever been made by any person connected with the *Craven Park* estate, and that no person has ever been allowed to use the towing-path for purposes unconnected with the navigation, and that notices have been at all times posted up warning persons not to make use of the towing-path for any other purpose than as a footway.

[The following Acts of Parliament connected with the *Lee* Navigation were commented on: 13 Eliz. c. 18; 7 Geo. 3, c. 51; 19 Geo. 3, c. 58; 13 & 14 Vict. c. cxix.; 31 & 32 Vict. c. cliv.]

Higgins, Q.C., and *Crossley*, for the Defendant:—

The main issues in this case are, first, whether the soil and freehold of the land occupied by the towing-path fronting the Defendant's property is or is not actually vested in the Plaintiffs; and, secondly, assuming the soil and freehold to be in the Defendant, whether the Plaintiffs have acquired such an easement or right over the towing-path as entitles them to have the exclusive use thereof, and to prevent the towing-path from being used by all persons, and especially by the owners of the *Craven Park* estate, for all lawful purposes, including therein the carrying along the path by carts, carriages, waggons, and other conveyances, all lawful ware, merchandise, goods, and materials.

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(1) Law Rep. 7 C. P. 458; Ibid. 9 C. P. 378.

By the Act of *Elizabeth* there was no power given to the trustees of the River *Lee* Navigation to take the land adjoining the river for the purpose of a towing-path, the only power was to compensate the owners of the soil of the river. It was not till the Act 7 Geo. 3, c. 51, that any mention was made of towing-paths, and then the trustees were bound to make compensation either by a sum in gross or by payment of a rent. There is no evidence that any sum of money was ever paid to the Defendant or his predecessors for this land; and as no conveyance to the Plaintiffs is produced, it must be assumed that the freehold was never parted with. On the other hand, there is evidence that a rent was paid for the land for a great number of years, down in fact to the year 1835. That of itself is sufficient to prove that the freehold was not parted with. The utmost, therefore, that the Plaintiffs can claim is a right of way over this towing-path in conjunction with the Defendant; and all the Defendant requires is the right to use the path for the purpose of conveying his bricks and other materials in carts, waggons, or other conveyances, but not so as to interfere with the free user of the towing-path for the purpose of the navigation. There is no evidence to shew that such user of the towing-path as we now claim has ever been abandoned or given up to the Plaintiffs as conservators, or to their predecessors as trustees of the navigation; on the contrary, there is evidence to prove that at certain periods the path has been used in various ways by the public as well as by the Defendant's predecessors. It is even shewn that there is a cottage erected close against the towing-path, and it is impossible for the inhabitants of that cottage to have access to it except by means of the towing-path. There are, moreover, two openings in the fence on to the path from the Defendant's land, and these could only have been made for the purpose of using the path. With respect to the towing-path beyond the Defendant's land, we contend that the public have a right to use the towing-path along the whole length of the navigation, and the Defendant has used it as one of

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the public. If any damage is done to the path by the Defendant he has always been willing to pay for the necessary repairs, and the Plaintiffs by calling upon him to repair the path must have supposed at that time that he had the right of user which he now claims.

The case of *Hollis* v. *Goldfinch* (1), which related to the River *Itchin*, is a distinct authority in favour of our contention that the proprietors of a navigation do not necessarily acquire such an interest in the soil on the bank adjoining to the canal as would enable them to maintain trespass. It was there held, moreover, that, as the purchase of the soil was not necessary for the purposes of the Act, it was to be inferred that no such purchase had actually been made, and that acts of ownership by the proprietors of the navigation on different parts of the bank contiguous to the river were not admissible in evidence.

MALINS, V.C.:—

This action raises a question of great importance to this navigation, and it also raises a question of very general public importance, namely, the extent of the control of the governing body of navigable rivers over the towing-paths and things connected with the navigation. To the Defendant, it seems to me, from all I have heard of the case, which has now occupied four days, one of the most insignificant questions, for I am satisfied that if he were to succeed to the full extent of his contention, it would be of very trifling value to him, while the principle upon which he would succeed would go to the annihilation of the right of the Plaintiffs, and their control over the navigation.

The River *Lee* is, and has been for generations, a navigable river from the town of *Hertford* to the River *Thames*. By the Act of 1868, the whole navigation has been handed over to the Plaintiffs, who are a body called the "*Lee* Conservancy Board."

The statute of Queen *Elizabeth*, passed in the year 1570, provided that the governing body of the navigation should have the soil along the whole length of the river for such composition as they should make with the owners and occupiers thereof. Every provision made by that Act had in view, not a temporary arrangement but an acquisition of the land in perpetuity, which means the fee simple. The Act of *George* III., which was passed in 1767, is the first Act in which the towing-paths are mentioned, and that Act provides for the making of towing-paths upon the land adjoining the river, and it provides for compensation being paid to the owners of land for any damages sustained in carrying the Act into execution, and the towing-paths are to be free from obstruction and to be subject to the by-laws made from time to time under the powers of the Acts, and any person who wilfully damages or destroys any banks or other works erected or made for the purpose of the navigation is to be liable to certain penalties. In my opinion a towing-path is a work erected or made, and any person interfering with it is liable to punishment. It is true that there is power given to owners of adjoining property to erect warehouses or other buildings on the banks of the river in their own lands, but such buildings are not to touch the towing-paths or otherwise obstruct the navigation. It appears by the evidence that for more than 100 years this towing-path has been set out by metes and bounds, if not for the whole length of the river of twenty-seven miles, at all events at this point which is in question, and there has been a distinct fence between the towing-path and the adjoining land, so that no person dealing with the property which is now owned by Mr. *Button* could possibly conceive that he had any right over the towing-path except as using it for the purpose to which it was dedicated. The Act of 1868, again, provides powers to make by-laws for regulating and enforcing the construction and maintenance of all necessary conveniences on the banks of the river, and for prohibiting the construction of anything which might impede, obstruct, injure, or interfere with the flow of the water of the navigation; so that the Defendant's notion that there is any power on the part of anybody to make wharves, or to do anything upon the banks of the river except with the sanction of the Conservancy Board, is utterly unsustainable. The 126th section is important, since it enacts "that by-laws made under the Act and allowed by order of Her Majesty in Council, shall have the same validity and effect as if they were enacted by Parliament, and shall not be questioned on the ground of unreasonableness or repugnancy to the law or to this Act, or on any other ground." Accordingly by-laws have been made, and amongst them is the 14th, which says that "no person shall allow any horses or cattle to stray or trespass on the towing-path or banks of the navigation." The 19th clause is this, "No person shall drive, make, place, or erect any piles, barge-beds, private walls, landing-places, cranes, or other conveniences, in or upon the waters of the navigation, or over any of the towing-paths or banks belonging to the board, without permission in writing first obtained from the board."

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(1) 1 B. & C. 205.

It is impossible therefore, in my opinion, to conceive a case in which more absolute dominion is given over the navigation and everything connected with it, including the towing-paths, than is given by these Acts of Parliament, and the by-laws made in pursuance of them, securing that which is absolutely necessary under the circumstances, that those who have the control of this navigation should have the control, not temporarily, but for ever, in order to prevent this intrusion and interference with their rights by persons such as Mr. *Button.* That gentleman is in the position of being the first person who has ever attempted to disturb this state of things, and I hope he will be the last, because I think he will find that he has been terribly mistaken in the whole course he has pursued.

I have the evidence of men going back sixty years to shew that this towing-path is now in the same state as it was then; that it was then, as it is now, separated by hedges and ditches, or fences of some description, for nearly the whole distance of the river; that although in some parts there was no visible fence, still it was defined the whole way from *Hertford* to *London* with perfect precision, shewing what was towing-path and what was not. With regard to Mr. *Button* himself, it seems that he acquired this property so recently as 1871. The extent of it is about sixty acres, for which he gave £45,000, and he purchased it from Mr. *Samuel Morley*, who purchased it from the trustees of Mr. *Craven*, who died in 1854. The ownership of Mr. *Craven* might be carried back about fifty years. It is proved distinctly that when Mr. *Craven* occupied the land there were orders of the board and notices posted up warning persons not to bring any horses or cattle or carts on the towing-path; that directions were given to the persons employed by the board to warn persons against doing so; that Mr. *Craven* never claimed the right to put vehicles upon the towing-path, and did not do so. It is quite clear to my mind that Mr. *Button* when he purchased the land in 1871 must have seen what he did buy and what he did not, and yet he was so infatuated with the idea that he was the owner of the towing-path, and had a right to go upon it with his carts, that he thought fit to carry along the path the bricks which he had made in an adjoining field. Then it is stated that there are two openings in the fence from his estate on to the towing-path, and it is fully conceded that every proprietor adjoining this towing-path has a right to make openings upon it to cross the path and get to the river. By crossing the path there will be no obstruction to the use of the towing-path; but what Mr. *Button* claims is a right to drive his carts along the towing-path, and to use it in any way he thinks fit for the purpose of carting bricks or other materials. This led to a correspondence in December, 1872, when a letter was written to Mr. *Button* by the engineer who has the control of the towing-path, requesting him to repair the road that he had cut up with his carts, and to cease using it for such a purpose. The answer of Mr. *Button* is to the effect that he would repair the path, and would always be glad to do his proportion of the repairs necessary to keep it in order. That was an assumption of authority, they did not want him to assist them in keeping it in repair. The evidence shews that they derive a large profit from the navigation, amounting to £15,000 or £16,000 a year from tolls, all of which is applicable to paying the expenses of the navigation, keeping everything in repair, and whatever is left is applicable to pay off the debt which they have, and when that debt is paid off their duty will be to lower the tolls as often as they can, because there is no private property in it, no dividend to be paid. It is public property, and all the money they receive is applicable for the purpose I have stated. They have abundant means, therefore, ready to do the repairs. But Mr. *Button* further says that the owners of his estate have always had a right of way over the towing-path, and that led to further correspondence, in which Mr. *Button* asserted his right and persisted in his claim, and the board, finding that he continued to carry his bricks along the path, ordered posts to be erected in such a manner as to prevent carts from passing; but Mr. *Button* the same night sent men to take the posts up again, thereby claiming the most absolute control over this towing-path. His conduct was certainly most improper in taking upon himself to interfere with these persons, who were acting according to the rights given them by Acts of Parliament and their by-laws. That they were to be interrupted by him because he happened to be the owner of an estate on the other side of the fence, is one of the most ridiculous propositions that ever possessed the mind of man, according to my view. It is shewn that in fact the towing-path was so much cut up during wet weather by the Defendant's heavy carts being driven along it that the road became dangerous, and one of the barge horses fell and was very seriously injured. The owner of the horse took proceedings against the Plaintiffs, as it was their duty to keep the road in order, and they submitted to pay the claim made against them.

The Plaintiffs were at length obliged to come to this Court, and this writ was issued on the 17th of February, 1877. It came on upon motion for an injunction on the 1st of March, and an undertaking was given by the Defendant that he would not cart any more bricks over the towing-path until the case had been heard. The evidence taken in the action has gone to an enormous length, but it has all resulted in the same thing, namely, to shew exclusive right in the Plaintiffs, and exclusive enjoyment by them, and no intrusion by anybody before Mr. *Button's* time, except by a few people who are proved to have come on to the path on a fair-day in order to avoid the toll at *Stamford Hill*, and the trustees did not think it worth while to interfere with them. In order to establish an adverse right it is not enough to prove that people went along a field or path, or any other place of that kind, but you must prove that it was done to the knowledge of the adverse party. If evidence of this kind were admitted, a right might be claimed over a gentleman's park because on some public holiday a great number of persons went across the park without being interfered with. I am of opinion that these things were not done as an adverse claim, but, on the contrary, the evidence is distinct that whenever people were seen to do it they were turned off and did not repeat the offence.

I have now had a lengthened argument to prove that the Plaintiffs are not entitled to the freehold, that is, that they are not entitled to the soil. I pointed out to Mr. *Higgins*, in the first hour of the case coming on, that, considering the purposes for which this body was created, it seemed to me perfectly immaterial whether they had the soil or not. If they have the ownership of the soil they are entitled to exclude by virtue of that ownership everybody from it; but if they have not the soil, what is their position? At all events they have the control of the towing-path for the purposes of the navigation, and that control is sufficient to enable them to exclude anybody from the use of it without their permission.

I find this laid down by Judges of great eminence in the case of *Winch* v. *Conservators of the River Thames* (1): "We see no objection to a dedication of a way to the public for such a limited purpose; and in *Rex* v. *Severn and Wye Navigation* (2), Mr. Justice *Holroyd* and Mr. Justice *Bayley* both laid it down, and we think correctly, that a towing-path may be a highway to be used only for the purpose of towing barges or vessels." Then I find Mr. Justice *Holroyd* says in that case (3), "It is a public highway to be used in a particular mode. A footway can be used only by foot-passengers and not by others, yet it is certainly a public highway." Mr. Justice *Bayley* says, "A towing-path is to be used only by horses employed in towing-vessels." If a towing-path is a thing to be used by horses only, towing vessels, where is the right of Mr. *Button* to use the towing-path for the carts and waggons containing bricks and other heavy materials? It is opposed to everything to be found in the shape of authority from the beginning of the law reports to the end. Mr. *Crossley* seemed to think that he had made a great discovery in the case of *Hollis* v. *Goldfinch* (4), which refers to the navigation of the River *Itchin*. The question was whether the trustees of the navigation could maintain trespass against the Defendant for having cut a tree upon the towing-path. The Judge had directed the jury in a particular manner, and the Court of Queen's Bench, sitting in banco, had to consider whether the Judge had rightly directed the jury, and they came to the conclusion that he had not rightly directed the jury, and ordered a new trial. Although it was not the Court of Appeal, it was a Court of very high eminence, presided over by Chief Justice *Tindal*, and several other eminent Judges who sat with him. The trustees of the navigation could not maintain trespass for cutting a tree unless they had the property, but it turned out in that case that there was no power to purchase any property whatever. They had, therefore, a mere easement. Here is a case in which, by the Act of Queen *Elizabeth*, and again in the Act of 1767, and again by implication if not expressly in the Act of 1868, this navigation have the power to purchase land by paying for it by a sum in gross or by a rent. It has been said that you cannot be the owner of property if you pay a rent for it. What is the fact? The Act of Parliament of 1767, sect. 5, gives them power to purchase land in consideration of money paid down—a sum in gross or payment of a rent. It appears in this particular case from the evidence of Mr. *Carble*, the clerk of the Plaintiffs, that this land was paid for by a rent; the receipts are produced from 1786, the first of them being in these terms: "Received the 10th day of August, 1786, of the trustees of the River *Lee* by the hands of *William Rook*" (he was proved to be the clerk at the time) "the sum of £6 for land rent due at Michaelmas, 1786." Then in 1788 there is a similar receipt for £4 10*s.* for rent of land used in the navigation of the river. That land rent I must assume was paid, probably from the time of Queen *Elizabeth*, at all events when that Act was passed down to 1835, and the clerk distinctly proves there never has been any payment of any description from 1835, which is a period of forty-three years. What, then, am I bound to infer from that? Either that Mr. *Craven*, or the person that preceded him, thought fit to give up this rent, or they considered the advantage of the navigation was so great to them that they did not think it worth while to demand it, and, therefore, it has gone by adverse possession. It can never be recovered now, because forty years is a bar; or, perhaps, he was satisfied by the payment of a gross sum. One of the witnesses states that Mr. *Craven* at that time bought the land; and it is highly probable that at the same time an arrangement was made by which this small rent was bought up. At all events no rent has been paid, and I hope Mr. *Button* will have the good sense to refrain from claiming payment of the rent, the last payment of which was made forty-three years ago. Under these circumstances my opinion is that the claim of the Plaintiffs is perfectly well founded to be the owners in fee simple of the whole of the towing-path from *Hertford* to *London.* I am satisfied from the evidence that they have had possession of it, they have exercised acts of ownership over it, and it is perfectly clear that they repaired it; they have done everything which the owners of the soil could be required to do. By the Act of Queen *Elizabeth* and the other acts of Parliament, including the Act of 1767, they acquired the fee simple, and whether they acquired it by the consideration of a sum of money paid down, or by the payment of rent, is, to my mind, perfectly immaterial; they are the owners of it, and I am satisfied they are the owners in fee simple of the towing-path all the way from *Hertford* to *London.* I am of opinion that Mr. *Button* is entirely without excuse; that he has been wrong from the beginning to the end; and I am, therefore, of opinion that the Plaintiffs have clearly and distinctly established a right against him to a perpetual injunction, as asked by the statement of claim, and they are entitled as a consequence of that injunction to the whole costs of the suit.

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(1) Law Rep. 7 C. P. 471.

(2) 2 B. & A. 646.

(3) 2 B. & A. 648.

(4) 1 B. & C. 205.

I cannot part with the case without making an observation as to the form of defence which has been made in this case. We know by the *Judicature Act* that instead of an answer there is what is called a statement of defence put in. The proper province of an answer was to simplify litigation as much as possible, and therefore the Defendant was always considered to act properly in admitting those facts which he could not deny, and it was to the interest of both parties that it should be so, because by admitting those facts which it was neither to his interest nor in his power to deny, it simplified the proof. I am now told that a totally new system has been introduced by the *Judicature Act,* and accordingly I am surprised to find that in this statement of defence the Acts of Parliament and everything proving that this navigation has existed for this length of time is denied. In the statement of defence it is thought fit to state this: "The Defendant denies that the Plaintiffs are the Conservators of the River *Lee* Navi-

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gation under and by virtue of the powers and provisions of various Acts of Parliament from time to time passed for the improvement and management of such navigation, commencing with an Act passed in the 13th year of the reign of Queen *Elizabeth*." I want to know what is the meaning of that? Can it be right to deny such a thing? It is denied by the Defendant that the navigation extends from *Hertford* to *London*.

Every fact stated in the statement of claim is denied. Would it have been proper in an answer to have done so? Nothing could have been more improper. A man is not at liberty in his defence to deny such things as these—that they are the conservators of the river, that the navigation extends from *Hertford* to *London*—because it only obliges the other parties to put in affidavits to prove these facts, which would have been saved if they had been admitted.

I think the claim set up by the Defendant is entirely groundless, and the decree will be, as I have said, for a perpetual injunction in the terms of the prayer, and the Defendant must pay the whole costs of the suit.

J. Pearson, Q.C., at first raised the question of damages, but afterwards withdrew the claim. He then asked for the costs of the motion when the undertaking was given by the Defendant, and also for the costs of the shorthand writer's notes of the *vivâ voce* evidence, which were taken in consequence of the importance of the case.

Glasse (*amicus curiæ*):—In the case of *Metzler* v. *Wood* (1) the Court of Appeal allowed the costs of the shorthand notes.

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MALINS, V.C.:—Then I will allow them. My reason is this: that it is a very long case. My notes are very full, and I hope correct; but in some cases, knowing that shorthand notes were being taken, I have referred to them, because it would be impossible for me to take down the whole of the evidence. I will allow the shorthand notes in this instance. The costs of the cause will include the costs of the motion.

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(1) 8 Ch. D. 606.

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From this judgment the Defendant appealed. The appeal came on for hearing on the 21st of February, 1879.

The same arguments were used as in the Court below.

Higgins, Q.C., and *Crossley*, for the Appellant, referred to *Badger* v. *South Yorkshire Railway Company* (1), and the following statutes connected with the *Lee* Navigation: 13 Eliz. c. 18; 7 Geo. 3, c. 51; 19 Geo. 3, c. 58; 13 & 14 Vict. c. cxix.; 31 & 32 Vict. c. cliv.

J. Pearson, Q.C., *Bond Coxe*, and *Romer*, for the Plaintiffs, cited *Bruce* v. *Willis* (2); *Hollis* v. *Goldfinch* (3); *Dyson* v. *Collick* (4); *Welch* v. *Nash* (5); *Keene* v. *Deardon* (6); *Attorney-General* v. *Terry* (7); *Attorney-General* v. *Great Eastern Railway Company* (8); *Crossley & Sons* v. *Lightowler* (9); *Winch* v. *Conservators of the River Thames* (10).

Higgins, in reply.

James, L.J.:—

In this case it seems to us that the Vice-Chancellor's order, to the extent to which it has gone, cannot be sustained.

The question raised by the pleadings merely—I do not say by the evidence—was one which the Vice-Chancellor seemed to assume was rather in favour of the Plaintiffs, but was not necessary for him to determine, that is to say, whether the *Lee* Conservancy Board and their predecessors had acquired the soil and freehold of the towing-path.

Now I am clearly of opinion that there is no evidence whatever of their acquisition of the soil and freehold of the towing-path or of the cut that was made. In truth this case has been argued as if there were a canal made. It is not immaterial to observe that what the *Lee* Conservancy Board or their predecessors had to do was to deal with the whole of the navigation of the River *Lee* as a navigable river from the River *Thames* up to near *Hertford*. That part which was called the canal was a mere cut which was made as a mode of improving the navigation. That is mentioned in the preamble of the 7 Geo. 3, c. 51, which is the important Act, and which describes what they are to do. Several hundred persons were appointed trustees "for the making, extending, improving, and maintaining the navigation of the said River *Lee* from the flood-gates belonging to the *Town Mill* in the town of *Hertford* to the River *Thames*, and for putting this Act into execution." Then they were authorized and empowered from time to time at their discretion to cleanse, scour, deepen, enlarge, or straighten the channel or course of the said River *Lee*, and also to set out, open, make and maintain all or any of the new cuts or canals hereinafter specified and described to communicate with the said River *Lee*, and to be used for the said navigation, and also to remove all obstructions and impediments whatsoever to the said navigation. Then there are a great number of other works mentioned, ending with these words, "and also to do and perform all acts, matters, and things which the said trustees or any five or more of them shall think necessary for the making, extending, improving, and maintaining the said navigation of the said River *Lee* from the flood-gates belonging to the *Town Mill* in the town of *Hertford* to the River *Thames*, and to enable them to execute the powers hereby vested in them." That is to say, for the purpose of making the navigation better, they were authorized to cut bends off and to make the river straight. Then it says "that a full and adequate satisfaction and compensation be made in manner hereinafter mentioned to all persons for the damages they may sustain from the carrying of this Act into execution as aforesaid."

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(1) 1 E. & E. 347.
(2) 11 A. & E. 463.
(3) 1 B. & C. 205.
(4) 5 B. & A. 600.
(5) 8 East, 394.
(6) 8 East, 248.
(7) Law Rep. 9 Ch. 423.
(8) Ibid. 6 Ch. 572.
(9) Ibid. 2 Ch. 478.
(10) Ibid. 9 C. P. 378.

Now, *primâ facie* one would suppose that it was not intended that they should have any different property in the new cut to that which they might have had in the rest of the River *Lee*. The new cut was only a straightening of the bed of the River *Lee*; *primâ facie* one would suppose that the straightened *Lee* from one end to the other was to be exactly what the unstraightened *Lee* was, that is to say, a river subject to all the rights of property of the riparian proprietors. Then they were to make satisfaction for damages. It is true that there is another clause giving power to them in case it

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should become necessary for them to become seised of property to acquire the property. That is only where it is necessary for them to do so. One would have supposed that it was not necessary for them to acquire the soil and freehold of the piece of ground which was either required for the canal or for the towing-path, which would be in fact making an impassable bar between one part of a man's property and another part which was not at all wanted for the purposes of the navigation. All that was wanted for the purposes of the navigation was that there should be a good water highway for the barges and a good horse-way and footpath for the horses and men towing the barges. It was not requisite, and it would not be reasonable that they should acquire anything more than that which has been called an easement, that is to say, that right which Parliament gave to them for the purpose of giving the public the right of way.

Starting with that, there is nothing to lay a basis for the presumption that because they have got a canal and because they have got a tow-path, therefore we are to infer judicially that they went through the usual proceeding necessary to give them the soil of the freehold, when in point of fact there is not a trace either in their own documents, books, or public records where things are recorded, of anything equivalent to the acquisition of the soil or freehold of any property whatever. It appears to me, therefore, that their claim to have the soil of the freehold of the towing-path, or the soil of the freehold of the navigable cut, is utterly untenable.

Again, I do not think it can be said that they had anything like a possession. They were not the owners, and they were not to be the owners. In truth, all these trustees were not made a corporation capable of acquiring seisin or possession of land. If they were, it would have been a most extraordinary title, because some hundreds of persons would have been tenants in common or joint tenants of the property. When the Act afterwards provided for the case of a conveyance, the conveyance was to be taken by seven of them, I suppose as trustees. But there was no body incorporated, or intended to be incorporated or made a *quasi* corporation for the purposes of the Act. They are a mere floating body of trustees, exactly of the same character as is to be found in all the Turnpike

Acts. They had no necessity for acquiring, and I think they did not acquire, the soil of the freehold. They had no reason to obtain, and in my view they did not obtain, any possessory right of any kind either to the cut or towing-path. But what they did get was a right, and with that right a corresponding duty, to keep and maintain the canal and the towing-path in such a state as that—in the words of the 69th section—"the said navigation shall from henceforth be a free navigation, and that all the King's liege people whomsoever shall and may have and lawfully enjoy free passage along, in, through, and upon the channel of the said river and such new cuts and canals as aforesaid, with and for boats, barges, lighters, and other vessels, and also the use of the towing or haling paths, and all other necessary and convenient liberties for navigating the same, without any let, hindrance, or obstruction from any person or persons whomsoever." Their right and their duty was to preserve it in that state. It appears to me that, having that public duty cast on them, they had the right to come to this Court to prevent any person interfering with the performance of that duty.

Then the question is whether they have shewn, independently of the right to the soil of the freehold, that the Defendant was doing something which interfered with that right and duty of theirs to keep the navigation unobstructed. In my opinion there is evidence to that extent. The evidence seems to me to prove that the Defendant did, on that part of the towing-path opposite his land, produce very essential damage. He did certainly claim to send his waggons and carts on land beyond his own property belonging to Mr. *Foster*, without any limit as to that right. It appears to me, therefore, that although the Plaintiffs have entirely failed in establishing their right to deal with it as their soil and freehold, they have got something which is for their purposes equivalent to the soil and freehold; that is to say, a power of preserving it and controlling it which enables them to say to any person, "You must not do anything which will obstruct the navigation." I think there must be an injunction to prevent the Defendant from going upon the towing-path in such a manner as to damage it, or to prevent the proper use of it for the purpose of the navigation, which will probably answer the object of the Plaintiffs.

With respect to the costs, it seems to me that the Plaintiffs have claimed a great deal more than they had a right to claim; and the Defendant, on the other hand, both by his evidence in the Court below and in the way in which he put the case, claimed a right of way which he has not sustained, namely, the right of using the towing-path in front of Mr. *Foster's* land and elsewhere for carts and horses. That being so, I am of opinion that the justice of the case will be met by there being no costs of the hearing below. As the Appellant has succeeded in very considerably altering the decree of the Court below, I think he ought to have the costs of the appeal.

BRETT, L.J.:—

In this case the trustees assume or assert a right to prevent the Defendant from going with carts and horses upon any part of the towing-path, either upon the part which is opposite his own land, or upon any other part of the towing-path.

The judgment of the Vice-Chancellor is that they have a right so to prevent the Defendant, and so to prevent anybody else, from going on the towing-path. He appears to have considered that this right was given to them by the Act of Parliament, even although the Act gave them no title of any kind to the land itself. I agree with my Lord that it is very difficult to suppose that any principle of law, either by statute or without, could give them so large a right as that, unless it gave them the property in the land.

Then arises the question whether they have the property in the land—whether they are the owners of the land in fee? It has been argued on their behalf that they are. It was admitted that the Act of Parliament itself did not pass the property in the land on which the towing-path is to the trustees, and therefore their right must be found elsewhere than in the Act of Parliament.

It was said that we ought to infer that there has been a grant or conveyance of the fee, but that it is a lost grant. It was said that we ought to infer that everything had been done to entitle them to the fee, except the mere execution of the conveyance, and that therefore, according to the rules of equity, we ought to treat the case as if that parchment conveyance had also been added to all the rest of their title. But, as it seems to me, there is no evidence which would entitle any Court to say that there had been a conveyance, and that it was lost. The Act of Parliament gives them power to purchase certain lands. Whether it gives them power to purchase the land on which the towing-path is to be made, I do not think it necessary to decide. It may give them the power to purchase the land upon which the towing-path is to be made, but it may also give them power to take that land and use it by way of easement.

Now, supposing that it does give them a power to use it by way of easement, it certainly does not oblige them to purchase the land; but if they take it by way of easement they must compensate the owners if the owners require it. Therefore they may be using this land legally by way of easement without having any conveyance of it. If so, the very foundation on which any Court is entitled to infer a lost grant fails, because, as I apprehend, the very primary and fundamental evidence which there must be in order to raise the question at all is, that the user of the land is such that it could not legally have been used as it has been without a conveyance; but if it might be legally used by way of easement, the very foundation of the doctrine does not apply. So that if this case had been tried before a jury there would have been no evidence to leave to the jury, in order that they might infer a lost grant. It seems to me, therefore, that there is no evidence by which such a conveyance could be inferred. Equally, therefore, in this case there is no evidence from which we could infer that everything was done except a mere parchment conveyance. It is consistent with all the evidence that they may have, even if that be necessary, taken the land by way of mere easement.

But I think we must go further in this case. It seems to me that this Act of Parliament does not require them to have an easement over the land at all, and that the only thing which is required of them is that they should enter upon lands if necessary to set out a towing-path, and if not necessary to set it out, that they should see that the bank is in a fit state to be used as a towing-path. They have that power, and inasmuch as they have also the power to take tolls, it seems to me that by the Act of Parliament, or as the inference from the Act of Parliament, as long as they do take tolls they have a duty to maintain the towing-path in such a state that it may be reasonably fit for enabling the public to tow barges along the river or canal. So that the Act of Parliament gives them no easement, the Act of Parliament gives them no possession, but it gives them a mere legal right of entry without possession, and it imposes upon them the duty as long as they take tolls to keep the towing-paths in such a state that the navigation of the canal and the use of the towing-path by the public may not be impeded. Apply that to the case of the towing-path opposite to the Defendant's land, and it leaves him the owner of that land. It is not properly a towing-path opposite his land, but it is a towing-path on his land, the Plaintiffs' only right being to use that towing-path, and to keep it in a fit state for the public to use it. He has every right over that land which is his own, other than a right to impede the navigation. The only prohibition against him by virtue of the Act is that the Plaintiffs have a right and a duty to see that there is a free towing-path over his land.

With regard to the land which is not opposite to the Defendant's land, it seems to me that the Defendant did insist that he had a right to go along the towing-path, which was not opposite his own land, and upon land therefore that was not his, by reason of a right of way for horses and carts which he says existed in him and his predecessors. As this case stands I see no evidence of such a right at all, and therefore the Defendant, so far as he insisted on going on the towing-path and land not opposite his own, was insisting on a right which did not exist.

But then comes the question whether the Plaintiffs had any legal right to oppose this illegal act of his? It was said that they had a right as against him, because they were in possession of the towing-path, and a mere possession of theirs would be good as against him as a wrongdoer. Now, supposing that they had that right of mere possession, it can only be set up as a justification for what they might do upon the assumption that they had no other right. They would not therefore be the owners of the towing-path, and could not have any legal right to the towing-path not opposite his land. I should have thought, although it does not seem necessary to decide it, that if that had been the state of things it would not entitle them to an injunction. It would entitle them to maintain an action of trespass, but upon so small a right as that of the Plaintiffs I should have thought that the Court would not grant an injunction against the act of the Defendant.

I thought at one time that they did shew that they had possession by reason of the evidence that they had set up gates along the old towing-path, taking it as a whole across the towing-path. But on reflection, and seeing what rights they had, I do not think that that evidence entitles us to say that they had possession of this land. Although, therefore, the Defendant had no right to pass along that land with horses and carts, it seems to me that the Plaintiffs were not in a position to be the persons to object on that ground; so that their right in respect of what he did on land not opposite his own is precisely the same, and no more, than their right to object to what he did on his land. Therefore their only right as to that would be to insist that he should not use the towing-path, whether on or beyond his own land, so as to impede the navigation. But he insisted on using that as a matter of right. He insisted on using it for the purpose of drawing bricks in carts along it. It is, I think, true that it has not been made out that in that part of the land not opposite his own he has so used the towing-path as at present to have impeded the navigation. But I must say that the natural result of what he was insisting upon as a right would in a very short time have that effect. Because to draw heavy carts and waggons with bricks along a road which the trustees are only bound to make a sufficient road as a towing-path must almost of necessity cut it up. At all events, I think the evidence is strong to shew that he has so used his own land on the towing-path as to cut it up, and to injure the use of it as a towing-path, and in so doing he has in that part as a fact impeded the navigation. What he insisted upon as his right to do in future, with regard to the other part, would almost inevitably lead to the same result.

Under those circumstances, I think the proper conclusion is that the order of the Vice-Chancellor should be modified in the way in which my Lord has expressed it, so as to enjoin the Defendant against using either that part of the towing-path which is on his own land, or that part of the towing-path which is not on his own land, so as to injure it to the extent of making it unfit for use as a towing-path, or to throw a greater burthen upon the Plaintiffs, who are bound to keep it in order as a towing-path, or so as to obstruct the navigation.

COTTON, L.J.:—

In this case the Vice-Chancellor by his decree restrained the Defendant from using the towing-path, even although that user should not in any way injure the towing-path or interfere with the navigation of the river.

For the purpose of considering whether or not the decree was right, we must, of course, consider what title the Plaintiffs have which they are coming here to defend. I think it necessary to consider a little what is the history of this navigation and of the trustees or conservators, for this reason, that a part of the *locus in quo*—I mean a part of the navigable *Lee*, on the banks of which the towing-path in question in this case is, or a portion of that towing-path—was a cut made artificially by the present Plaintiffs or their predecessors; and the case has been argued as if this were like a canal made entirely from beginning to end by certain persons in whom the navigation was vested with powers of controlling the navigation. I think that is an erroneous way of dealing with the matter; for if one turns to the Act of Geo. 2, which is recited in the Act on which the principal contention in this case has arisen, we find that even before the Act of Geo. 2 there had been what is there called "an ancient and accustomed navigation on that part of the river *Lee* which runs from *Hertford* down to the *Thames*." That is, in fact, the part of the river *Lee* which the present conservators, who are the Plaintiffs, deal with, and it was not as if the Act of Geo. 3 gave them power to make cuts even for the purpose of creating a new navigation; but what the Act of Parliament did was this—there being the old and imperfect navigation of the river *Lee* from *Hertford* down to the river *Thames*, power was given to them to improve generally that navigation, and to make it one free, available navigation for all His Majesty's subjects; and for that purpose, partly to improve the old course of the river and partly to make, as a portion of the navigation of the river *Lee*, cuts which they should from time to time think it necessary to make in certain specified places so as to shorten the river or to make a more easy navigation.

Now, look at what were the powers given them generally. They had power given to them which I think it is improper in any way to refer to as an easement. They had power given to them for the benefit of the public, to deal with the navigation of the river *Lee* as then existing, and to be improved by them, partly by deepening the old bed of the river and partly by making a new cut, and then they had power to make a towing-path along the whole course of the navigation as so improved by them.

The argument in favour of vesting in the Plaintiffs the soil and freehold of the new cuts made by them, and of the towing-path made by them, if good at all, must apply very strongly to the bed of the old river, and must certainly apply to the towing-path of the old river. In my opinion there is nothing in the Act of Parliament which vests in the trustees or conservators, whichever they are called, either the bed of the old river or the bed of the new cuts, or the soil and freehold of the towing-path to be made by them for the purpose of using the navigation. They have power given to them to improve the bed, new or old, and to make new cuts by way of improvement. They have power given to them throughout the whole course to set out so far as necessary, and to make and improve, paths by the side of the navigable part of the river for the purpose of enabling, either by horses or men, barges and boats to be towed up and down.

No doubt that was not all. Parliament saw that it might be found necessary to buy certain things, as, for instance, weirs, which the trustees might have entirely to remove for the purpose of improving the navigation. So that, besides the power of dealing with the river and dealing with the banks and making a towing-path and other conveniences for the navigation, they had, if necessary for the purpose of performing their duty of making the navigation fit for the public, power given to them of buying only such land as they might find it necessary to acquire. Then, that being so, unless and except so far as they exercised their power of buying, they were simply in the position of persons who had a statutory duty to perform for the benefit of the public, namely, this duty of making the navigation available for His Majesty's subjects.

As regards this particular point, ought we to come to the conclusion that they have vested in them the soil and freehold? In my opinion, no, unless it can be shewn that there was anything which they could not do without acquiring the soil. They had, under their Act of Parliament, no soil vested in them *ex necessitate;* they had only the power of acquiring it. If they had power to do what was necessary to the navigation without buying and acquiring land, we ought not (in the absence of evidence that in fact there was a purchase by them, either in the way of deeds produced, or proof that any money was paid by them as purchase-money) to presume that they purchased. In the absence of any such evidence we ought, I think, to presume a grant by way of purchase only when, but for the existence of such grant, the act would be an act of trespass. I can see nothing in the present case which they might not reasonably, under the powers of the Act of Parliament, have done without making themselves lords and masters of the soil.

That being so, they come here in this position—not in the position of persons who can say, This is our land—your coming here is a wrong of which we can complain, even although we do not shew that you have done us any injury. They are in the position of persons who are entitled to come here and say, You must not in any way interfere with the exercise by us of our Parliamentary power of making the river navigable—you must not interfere with us by abusing the towing-path, which we have to provide and properly to keep up for the benefit of the public using this river.

That being so, how do they stand as regards the two portions of the towing-path? As regards that which stands on Mr. *Foster's* land, what case do they shew? They do not shew with regard to that that there has been any act of the Defendant which has obstructed the use of the towing-path for the navigation, or which has injured the towing-path. I say so because I think we cannot hold that driving a cart along that towing-path must of necessity interfere with the navigation of the river. Possibly sometimes a cart going along there may cause some difficulty when it happens to come to a place which is a little narrow, and there is a barge

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coming the other way. But I apprehend, although that may be so, that is not such a substantial and material interference with the navigation of the river, and the use of the towing-path for that purpose, as to entitle the Plaintiffs to come to this Court, and ask for an injunction. That being so, although the Defendant has made out no right of going over that part of the towing-path, and although as against Mr. *Foster* he is a trespasser, yet as against the Plaintiffs he is not. He is not coming on their soil, and he is not shewn to be interfering in any way with any right which they have, or interfering with the exercise of their power and duties under the Act of Parliament; and if a suit had been instituted in respect of that piece of land, I should have been of opinion that the Plaintiffs had failed altogether.

Upon the other part of the towing-path, namely, on that part of the towing-path which has been set out by the Plaintiffs over the land of the Defendant, and which they have a right to have protected for the purpose of its being used for the navigation, there is some evidence that he has used it in such a way as to injure the towing-path, and therefore to prevent it being conveniently used for the purpose of the navigation. Therefore, as to that part, I am of opinion that the Plaintiffs have properly complained; and they are therefore entitled to an injunction in support of their rights, but it must be an injunction modified from that which the Vice-Chancellor has granted. I think this will properly express what the judgment of the Court is: "An injunction is granted to restrain the Defendant, his servants, workmen, and agents, from in any way damaging or obstructing the towing-path connected with the River *Lee* navigation in the claim mentioned, or using the same in any manner which interferes with its free use for the navigation of the river." That is not confined to an interference with the towing-path on the Defendant's land, but, it being proved that in that spot he has used the towing-path so as to interfere with the navigation, and injure the towing-path, the Plaintiffs are entitled to an injunction generally to restrain him from using any portion of the towing-path in the way I have pointed out, so as to damage or injure it, or prevent it being used for the purpose of the free navigation of the river.

Then I agree with what Lord Justice *James* has said that there be no costs up to and including the costs of the original hearing, but the Appellant will have the costs of this appeal.

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JAMES, L.J.:—

I think the order ought to be prefaced with this: "The Court, being of opinion that the Plaintiffs have not established any right to the soil of the freehold of the towing-path, or any possessory right, discharge the Vice-Chancellor's order, and in lieu thereof," and then the injunction will be granted in the terms which have been mentioned.

Solicitor for Plaintiffs: *R. J. Pead.*

Solicitors for Defendant: *Carr, Bannister, Davidson, & Morriss.*

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[1873 P. 162.]

STURLA *v.* FRECCIA.

[1876 S. 353.]

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V.-C. M.
Dec. 3, 4, 9, 10, 11, 16, 17, 18.
1879
Jan. 13, 14, 15, 20, 21, 22;
Feb. 26;
June 24.
C. A.
July 4, 5, 7.

13QBD.5

Evidence—Public Document—Report of Department of State—Entry in Discharge of Official Duty.

Reports of a public department of state are not admissible as evidence of facts stated therein.

Observations on the practice of the Committee of Privileges of the House of Lords as to the admission of recitals in private Acts of Parliament as evidence in Peerage cases.

Entries by a person in the discharge of his official duty are only evidence of the facts therein stated when the facts are parts of a transaction effected by such person himself which it is his duty to record.

In a suit for ascertaining the next of kin of an intestate, the principal question was as to the identity of *A. M.*, the father of the intestate, with a person of that name who was born at *Q.*, near *Genoa.* In support of such identity the Plaintiff tendered in evidence a photograph copy of a report of a public department of the Genoese Government which had been directed to report whether it was expedient to appoint *A. M.* a diplomatic agent of the government. The report certified his fitness for the office, and also certified that he was born at *Q.*, and was forty-five years of age; and that these facts had been ascertained from persons well acquainted with him:—

Held (affirming the decision of *Malins*, V.C.), that, assuming the authenti-

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city of the document of which a copy was produced, it could not be used in evidence of the place or date of birth of *A. M.*, either on the ground of its being a public document, or as a statement of contemporaneous facts by persons in discharge of an official duty.

Affirmed by H/L 5 App Cas 623.

THE suit of *Polini* v. *Gray* was instituted under the following circumstances:—

Mrs. *Brown*, usually called Mrs. *Mangini Brown*, died in *London*, intestate, on the 21st of December, 1871, leaving personal estate to the value of about £200,000. She was a widow of above ninety-three years of age. She had survived all her children and descendants, and it was not known whether she had any relations, consequently her estate was taken possession of by the Solicitor to the Treasury on behalf of the Crown; and this suit was instituted by persons claiming to be Mrs. *Brown's* next of kin. In December, 1873, a decree was made in the suit directing a reference to Chambers to inquire who were the next of kin. It was not disputed that the father of Mrs. *Brown* was *Antonio Mangini*, who was for many years the Consul-General, and afterwards diplomatic agent of the Ligurian Republic in *London*, and who died in July, 1803. The Chief Clerk's certificate, which was made in March, 1876, found that *Antonio Mangini* was a native of the village of *St. Ilario*, near *Genoa*, and was baptized there as *Antonio Mangini*, the son of *John Baptiste Antonio*, in 1735; and that the five Defendants, members of the *Freccia* family, were the next of kin of the intestate. When the case came on for further consideration, the Court made an order in favour of the *Freccia* family. Before the order was acted upon a fresh claim was made by Madame *Sturla*, who alleged that *Antonio Mangini*, the father of Mrs. *Brown*, was a different person from the *Antonio Mangini* who was born at *St. Ilario;* that he was born at *Quarto*, near *Genoa*, and was baptized there as *Antonio Maria Mangini* in 1744, and that she was the granddaughter of his elder and only brother. This claim was referred to the Chief Clerk to report whether Madame *Sturla* had made out a *primâ facie* case, and on his reporting in the negative a further order was made on the 8th of August, 1876, that the funds should be paid to the Defendants. Two of the shares were paid out of Court in pursuance of this order.

The action of *Sturla* v. *Freccia* was then commenced by Madame *Sturla* to substantiate her claim. The main point at issue in the action was the question whether the father of Mrs. *Brown* was identical with the *Antonio Mangini* who was baptized at *St. Ilario* in 1735, as the Defendants maintained, or with the *Antonio Maria Mangini* who was baptized at *Quarto* in 1744, as the Plaintiff alleged.

The Plaintiff rested her case in great measure upon the following evidence:—

On the 26th of June, 1789, a letter was written by the Consul *Mangini* to the Government of *Genoa*, asking that he might be appointed the diplomatic agent of the Republic. The matter was referred to the *Giunta della Marina*, or Board of Marine, to report whether it was expedient to appoint him agent.

On the 26th of April, 1790, the *Giunta della Marina* presented their report, by which they certified that *Mangini* had acted with great circumspection in his character of consul, and that his conduct met the full approbation of the board; and it went on to state that Consul *Mangini* was a native of *Quarto*, aged about forty-five, of civil extraction; that when still a youth he wished to try his fortune elsewhere, and went to *Lisbon* and afterwards to *London*, and mentioned other particulars of his past history and present mode of life, and it then stated as follows: "All these facts are extracted from persons who have been in *London*, and who have been regular visitors at his residence and know him thoroughly, as well as from some merchants here who have been in correspondence with him, and have all spoken of him in the same way."

This report was alleged to have been discovered by *Cevasco*, the agent of the Plaintiff, in August or September, 1876, among the public archives of the city of *Genoa*.

In consequence of the discovery of this new evidence a fresh inquiry took place before the Chief Clerk, who was of opinion that the report had been tampered with and was not a genuine document, and he certified that the Plaintiff had not established her claim.

A summons was then taken out to vary the Chief Clerk's certificate, which came on to be heard before Vice-Chancellor *Malins* on the 3rd of December, 1878, and occupied eight days in that month and seven days in January and February, 1879. A photograph copy of the report of the *Giunta della Marina* was produced before the Vice-Chancellor, the Genoese Government having refused to part with the original except upon an undertaking that its authenticity should not be disputed.

The reception of this document as evidence was objected to by the counsel for the Defendants.

J. Pearson, Q.C., and *E. Beaumont*, for the Plaintiff in *Sturla* v. *Freccia*.

Higgins, Q.C., and *Everitt*, for the Defendant *M. Freccia* and other Defendants.

Bagshawe, Q.C., and *Eyre*, for two other Defendants, members of the *Freccia* family.

Rigby, for the trustees of the fund.

1879. June 24. MALINS, V.C., delivered his judgment, in which he fully considered the evidence on the whole case. With respect to the report of the *Giunta della Marina*, his Lordship said: The Plaintiffs mainly rested their case upon a document said to have been discovered by *Cevasco*, and but for the discovery of which it is plain no attempt would have been made to disturb the order of the 8th of August, 1876. That document is the report of the *Giunta della Marina*. The origin of this document is stated to be this: *Antonio Mangini* had been appointed Consul-General of *Genoa*, or the Ligurian Republic, as it afterwards became in 1780. He had occasion to make many communications with the government. A consul, we know, is a commercial officer, and supposed to be connected with commerce. He found it very inconvenient not to be able to communicate with the government as diplomatic agent, and he therefore wrote to the Republic, stating that it would be a very great advantage if, in addition to being consul, he had also conferred upon him the office of diplomatic agent. He obtained the highest testimonials. He seems to have been a man very highly esteemed by everybody. The Republic had great confidence in him, and he had been their consul for ten years. The diplomatic persons in *England* had a high opinion of him, and therefore he was, in the year 1790, appointed diplomatic agent of the Ligurian Republic in addition to being Consul-General. The evidence goes to shew that there was a body existing at *Genoa* which was in the habit of making inquiries and reporting before persons were appointed to any official situation, called the *Giunta della Marina.* Now the office of the *Giunta della Marina,* as I collect from the evidence, was to report to the government whether the person proposed to be appointed was fit to receive the appointment he asked for. The duty of the *Giunta della Marina* on this occasion was therefore simply to report whether the consul was a man fit to be appointed also diplomatic agent. Accordingly, if this document is a genuine document at all, a report was made and reliance is placed upon two passages in it. Before I read the document, or a copy of it rather, I may say with regard to the genuineness of it I do not think it is necessary for me to give a decided opinion. It is certainly very remarkable that *Cevasco* should have gone to *Genoa* after the litigation had come to an end and have found a public document containing a statement of the very facts which he wanted to prove, namely, that the consul was born at *Quarto* and was about forty-five years of age, which agreed with the register at *Quarto.*

The conduct of *Cevasco* on discovering the document certainly creates the greatest suspicion. He says he discovered it at the end of August or the beginning of September, and yet he did not make his discovery known in *London* till the 18th of September, although he knew that an order had been made to pay the funds out to the *Freccias,* which he might well suppose would be immediately acted upon; and which had been acted upon as to two of the five shares by actual payment to the parties entitled, under the order of the 8th of August, 1876. Now, with regard to the discovery of this document, the observation may be made that *Cevasco* was under the strongest bias that a man could possibly be under. According to the case stated by Mr. *Pearson* to me, he was to receive 25 per cent. of the spoil; that is, of whatever was recovered he was to have one quarter. The sum expected to be recovered was no less than £200,000, and therefore if *Cevasco* could succeed, £50,000 was his remuneration. But not only that, he would get back the money he had paid into Court as security for the costs. Now, therefore, in this frame of mind he goes to *Genoa*. Mr. *Pearson* stated to me that he could never have intended anything improper, because if he had he would not have consented to the money going out on the 8th of August. I suggested to Mr. *Pearson* that it is very possible when he came to reflect upon the serious expense he had sustained—all the expense of bringing Madame *Sturla* to *London* and maintaining her for a considerable time—that he had been already put to an expense of £2000 or £3000—when he came to reflect upon the serious loss he had sustained, it is very possible that this plan may have presented itself to his mind. He may have thought, "If I can go to the archives of *Genoa* and produce a document that will shew the consul was born at *Quarto*, I shall succeed in getting £50,000, besides getting back all I have lost." He was cross-examined, and he says at page 10, "I searched on about fifteen or twenty different days." Then he says, "During my search I found a document relating to *Mangini*, the Genoese consul at *London*. I cannot say on which of the fifteen or twenty days of my search I found this document." It was certainly to be expected that he would have made an exclamation immediately, "I have now got the very thing I wanted." But he says, "As soon as I found it I never said a word to any one about it, but I went to my solicitor and told him that I had found a document relating to *Antonio Mangini* of *Quarto*. I did not tell the officials at the office of the archives that I had found what I wanted. I continued my search after I had found this document, but not so assiduously as before, until I had passed through all documents relating to the time of the Genoese Republic." His own conduct, in my opinion, is calculated to throw the greatest suspicion upon the truth of the story he tells. It was suggested, I think, by Mr. *Higgins*, that it was very possible he found a document relating to the consul, but not containing what he wanted, and having found it in the middle of another document, he pocketed it, took it away, had the necessary alterations made in it that he wanted, and then took it back. It is impossible for me to say how it was done, but human ingenuity, as we all know, is very great, and we know by bitter experience how eager the appetite for money is with all mankind, and I suppose it is not less with Italians than it is with English people. It is therefore impossible to know what a man might be induced to do in order to get £50,000 if he should succeed.

Now, my Chief Clerk came to the conclusion that if the document was not altogether a forgery, it had at all events been tampered with as regards the statement of the birth at *Quarto* and the age. I have not seen the document, although I have seen and carefully considered a photograph of it. I have not seen it, because it was represented to me that the Italian Government were very reluctant to produce it, and if they did produce it they protested against any decision being given in this country as to its genuineness, which they said must be decided by the tribunals in *Italy*. Therefore, as I have already said, it is not necessary for me to give any opinion whether it is genuine or not. I did not ask for the production of it, although I was several times urged to do so. Not having seen it, I do not feel competent to give an opinion on the subject, nor do I think it necessary to do so, because, assuming it to be as genuine as the Plaintiff represents it to be, I am of opinion that it cannot be accepted as evidence as to the place of birth or the age of the consul. Perhaps before I say more I had better refer to the terms of the document itself. It is in these words: "Most serene Sirs—On the occasion of having been brought to your most serene worships' knowledge, the magnific English consul's urging to keep imprisoned at disposal of his Court the two officers," and so on. Then it recites a transaction about two officers who, I think, had been seized by the British Government. Then it goes on, "It was observed in the most serene circle how unpleasant it was not to have in *London* a proper person authorized to present occasionally some of their notes, as it was not the custom to receive them through mere consuls, and therefore how advisable it would be to consider whether it was convenient to empower for such purpose the actual consul *Mangini*, giving him the title of agent according to the application made by himself." Then it states the reference of "the above conversation to the most excellent Board of Marine with command to report." Then they go on to report the great services that he had rendered, and further, that he (that is the consul) "acted with great prudence and circumspection, and with full satisfaction of your most serene worships; and even on such occasion he gave a clear proof of his disinterestedness, as he wrote a letter of thanks and would not even have his postage expenses repaid." Then it states that their "most serene worships have advised him to keep an account of them to be sent forward at proper time for reimbursement." It does seem to me a most trivial sort of thing to go into that in such a document as this. Then it proceeds: "Notwithstanding this, the aforesaid most excellent Board, on being to-day again commanded to obtain more precise information and knowledge of the person of *Mangini*, has the honour to submit to your most serene worships of having found that Consul *Mangini* is a native of *Quarto*, aged about forty-five, and of civil extraction." That is the passage which is relied on. Then it goes on to say, "When still a youth he wished to try his fortune elsewhere, and therefore having received from his father a proportionate allowance he betook himself to the city of *Lisbon*." Mr. *Pearson* goes through this, and says, "I shew you that all these statements are correct, and therefore because those statements are correct the statement as to the birth is correct." Every one of these statements may be applied to the consul if he were born at *St. Ilario*. There is no positive evidence that he did go to *Lisbon;* but there is no improbability that he did from the circumstance of his daughter going there with her husband, when the husband settled there after his failure in *America*. Then it goes on to say: "That owing to his ability he entered in the quality of a clerk in the counting-house of *Oppe & Silva*, first class merchants in the city of *Lisbon*, who had also a commercial house in *London*. By these he was after some time admitted into partnership; but the same having after some years stopped their business, *Mangini* passed to *London*, and joined in partnership with *Charles Jackson*, banker, under the style of *Jackson & Mangini*." Mr. *Pearson* referred to the directory for Mr. *Mangini;* and there is no doubt that the consul did go there, but it does not shew that he came from *Quarto*, because he equally did that whether he came from *Quarto* or *St. Ilario*. Then they go on to say that he was on very intimate terms with Mr. *Jackson's* brother in the Admiralty, and he got everything he wanted from him. And then comes this passage, "All this information has been obtained from persons who have been in *London*, and who have been regular visitors at his residence and known him thoroughly, as well as from some merchants here who are in correspondence with him, and who have all spoken of him in the same way. Therefore the aforesaid most excellent Board had nothing to do but to leave your most serene worships to deliberate upon the course you may consider fit to take." Then after that report he is appointed diplomatic agent; and that is relied upon, against everything else, to prove that he is a native of *Quarto*, and of the age stated in the register.

Then Mr. *Pearson* read several affidavits of skilled persons to prove the character of this document. There was evidence read at considerable length to prove it was not genuine, and there was a contradiction on that as on other subjects. There was also evidence read to shew that the report of the *Giunta della Marina* was made in accordance with their usage and in strict performance of their duty. I do not think it necessary to go into that evidence, because I consider that the only duty the *Giunta della Marina* had to perform was to report upon the fitness of the consul for the diplomatic agency to which he was proposed to be appointed; and upon that question it was perfectly immaterial whether he was born at *Quarto* or *St. Ilario*, or whether he was forty-five or fifty-five years of age. The case therefore falls strictly within the principle decided in *Chambers* v. *Bernasconi* (1). That case is one which lawyers are very familiar with. The whole question which arose in the celebrated bankruptcy of Mr. *Chambers*, the banker, was whether the entry by a deceased sheriff's officer that he had arrested *Chambers* could be received in evidence. It was admitted as good evidence; he had arrested him, but he had arrested him, he said, at a particular place, and it became material to decide whether he was arrested at *Paddington*, where he lived, or in *South Molton Street*. The officer made an entry that he had arrested him on a particular day at *South Molton Street*, and if that had been received as evidence it would have had a most material influence on the result of the case. It is sufficient for me to say that the Court of Exchequer first of all, and afterwards the Exchequer Chamber, agreed that the evidence of the place of

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(1) 1 C. M. & R. 347.

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arrest could not be received, because it was not the duty of the officer to state it. It was his duty to state he had arrested him, but not the place where he arrested him. The judgment of the Court of Exchequer Chamber is given by Lord *Denman*, and I only read the part relating to this point, namely, whether the evidence under such circumstances was admissible or not. His Lordship says (1), "The discussion on this point involved the general principle of evidence, and a long list of cases determined by Judges of the highest authority, from that of *Price* v. *Lord Torrington* (2), before Chief Justice *Holt*, to *Doe* v. *Turford* (3), recently decided by Lord *Tenterden* in the Court of King's Bench, was cited. After carefully considering, however, all that was argued, we do not find it necessary, and therefore think it would not be proper, to enter upon that extensive argument, for as all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails the Plaintiff in error cannot succeed; and we are all of opinion that whatever effect may be due to an entry made in the course of any officer reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done."

Now here the duty of a *Giunta*, if they had a duty, was to ascertain whether the consul was a fit man to be appointed diplomatic agent, but whether he was born at one parish in the neighbourhood of *Genoa*, or whether he was born at another—whether he was fifty-five years of age or forty-five—was perfectly immaterial, and therefore that falls within the description here given, that it is only a mere collateral matter, and no part of their duty to make such a statement. The principles of that decision have been strictly adhered to by the Courts. The principles on which entries of deceased persons are received in evidence, although this is not the case of a deceased person, I apprehend, are the same, and they are laid down in the case of *Price* v. *Lord Torrington* (1), where the entry of a deceased brewer's drayman that he had delivered beer to a customer for his employer was received in evidence, because it was made in the ordinary course, and in the discharge of his duty. It was also his duty to make the entry.

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(1) 1 C. M. & R. 367.

(2) 1 Salk. 285.

(3) 3 B. & Ad. 890.

The same principle is enunciated in the case of *Doe* v. *Turford* (2), where an entry of the deceased solicitor was received as evidence of the service of a notice to quit. The reasons stated by Lord *Tenterden* are: "I am of opinion that the evidence was properly received. I take it to be proved that the practice in Messrs. *Bellamy & Patteshall's* office was, that any person who undertook to serve a notice to quit, indorsed on the duplicate at the time of the service the fact of his having served the original. Notices to quit were usually served by the clerks, and not by the principals, but a principal might occasionally serve such a notice, and we must assume that when a principal served the notice he would do what he required his clerk to do. Now here, it is proved that *Patteshall* took the notice with him, when he went out, and that the indorsement on it is in his handwriting. Then the indorsement having been made in the discharge of his duty, was, according to the authorities cited, admissible evidence of the fact of the service of the original." Mr. Justice *Park* speaks to the same effect, and all the Judges of the Court took the same view.

Then in *Poole* v. *Dicas* (3), the entry of the dishonour of a bill by the deceased clerk of a notary was received as evidence, because it was made in the ordinary discharge of his duty.

In *Smith* v. *Blakey* (4) it is laid down by Lord *Blackburn* that in order to make such entries evidence they should not only be made in the discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entries relate, and then to make a record of it. Now this is a

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(1) 1 Salk. 285.

(2) 3 B. & Ad. 890, 895.

(3) 1 Bing. N. C. 649.

(4) Law Rep. 2 Q. B. 326.

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remarkably strong case as to the rejection of evidence, because, it was the duty of the confidential clerk, who managed a branch business of the Plaintiffs, as general merchants, to keep them duly advised of all business transactions. There the firm carried on business at *Liverpool*, and it was done by the agency of the clerk and in discharge of this duty he wrote them a letter, stating that the Defendant had sent three cases to the office, and giving details of the transaction under which they were sent. It was "Held that this letter was not admissible in evidence against the Defendant after the clerk's death, as it was neither a declaration against pecuniary interest, nor an entry made in the discharge of a duty to do a particular act and make a record of it." Mr. Justice *Blackburn* says (1), having cited the case of *Chambers* v. *Bernasconi* (2), "The reason of the distinction is not at first sight very obvious; but I think all the cases shew that it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it." Then Mr. Justice *Mellor* says that there are two exceptions to the rule, an entry against the interest of a deceased person, and an entry made in the course of duty, and as to the first he says that is confined "to an entry against interest in a pecuniary point of view; the present letter does not therefore come within that exception. As to an entry in the course of duty, that must be made contemporaneously with the act done, and there must be a duty to do the particular act, and at once to make a record of it." No one will say there was any duty on the part of this *Giunta della Marina* to state where the consul was born, which was an immaterial fact, or to state his age, which was equally immaterial.

I am therefore of opinion that, assuming the document to be genuine, its statements on these points cannot, upon the result of these cases, be taken as evidence, and certainly not as conclusive evidence, against the mass of facts which go to shew that those statements cannot be correct. I may say of the document itself, on the face of it, it is a very loose document; the statements are very loose, being only what people heard from somebody in

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(1) Law Rep. 2 Q. B. 332.

(2) 1 C. M. & R. 347.

London. Amongst other things I find they state he lived decorously in *London*. From what we have heard, nobody would say, considering that he was Consul-General and diplomatic agent, not having a house where he could take a wife to, if he had one, that he was living decorously. No doubt, as they say, the Genoese people were well received by him. Perhaps he took them to a chop-house to dinner with him, and that is what they probably call living decorously in *London*. The whole thing is really exceedingly loose, and not worthy, in my opinion, of attention.

HIS LORDSHIP then said that on full consideration of the whole case he was of opinion that the Chief Clerk had come to a right conclusion that the Plaintiff was not, and that the Defendants were, the next of kin of Mrs. *Brown*. The summons to vary the certificate must therefore be dismissed with costs.

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From this decision the Plaintiff appealed. The appeal came on to be heard on the 4th of July, 1879.

J. Pearson, Q.C., and *E. Beaumont*, for the Appellant, opened the case, and tendered in evidence the photograph copy of the report of the *Giunta della Marina*.

Bagshawe, Q.C., and *Eyre*, for two of the Defendants:—

We object to the reception of the document. Assuming that the document is authentic, and that it is receivable as a public document without proof of its authenticity, no such proof having been in fact given, it is not admissible for the purpose for which it is tendered, namely, as evidence of the facts stated therein. No doubt some public documents are evidence of the facts stated therein, but they are documents which contain entries made in pursuance of a public duty, and intended for public use, such as parish registers, or royal proclamations to inform the public of public events, such as declarations of war. But there are other public documents which are not evidence of the facts stated in them, such as private Acts of Parliament, which, although declared to be public Acts, are not evidence of the facts recited in them against any but the parties. So a report of a royal commission is not evidence, although it is a public document: *Roscoe* on

Evidence (1). The report now tendered in evidence is a document of the latter kind. The object of the report was to satisfy the government of the fitness of Consul *Mangini* for the office of political agent, but it is no evidence of the facts stated as to his place of birth or his age, which were quite immaterial for the purpose of the report: *Chambers* v. *Bernasconi* (2); *Smith* v. *Blakey* (3). Moreover, those facts do not profess to be stated upon the personal knowledge of the members of the *Giunta*, nor from information derived from *Mangini* himself, but from the mere hearsay evidence of his friends. It is therefore neither receivable in evidence to prove the facts alleged, as a public document, nor as a record of facts made by official persons in the course of their duty.

Higgins, Q.C., and *Everitt*, for other Defendants.

J. Pearson, Q.C., and *E. Beaumont*, for the Plaintiff:—

It is impossible to tell at the present time whether the place of birth and age of *Mangini* were or were not material to the question of his fitness for the office. Certainly his birth within Genoese territory was material, and probably all the facts stated were material; they were all part of the *res gestæ* of the matter upon which the *Giunta* had to report: *Doe* v. *Robson* (4). We say therefore the statements in question are admissible as the statements of contemporaneous facts by competent persons in the discharge of their official duty, who had no interest in making a false report.

We do not tender this document as evidence of pedigree, but of identification. It is evidence of repute, of the belief of the contemporaries of *Mangini* that he was born at *Quarto*. There are several instances of public documents being evidence of matters stated in them besides those mentioned by the other side, and some are very similar to the present document. For instance, the reports of the Visitations of the Heralds' College under a royal commission have been held to be evidence of pedigree: *Phillips* on Evidence (5). It may be true that the recitals in private

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(1) Page 192.

(2) 1 C. M. & R. 347.

(3) Law Rep. 2 Q. B. 326.

(4) 15 East, 32.

(5) 10th Ed. vol. ii. p. 129.

Acts are not now evidence of the facts stated in them as against strangers, but it was not so formerly, when the bill used to be referred to the Judges, who examined witnesses on the matter, and made a report upon the facts which were stated in the preamble: *Halcomb* on Private Bills (1). In the *Nairne Peerage Case* (2), among the proofs establishing the title of the claimant was the report of the Attorney-General and Lord Advocate finding the preamble of an Act of Parliament in 1824, by which the attainder was reversed, and *William Nairne* was restored to the title. *William Nairne* had died without issue, and the report was used as evidence to shew that *William Nairne's* parents had two other children who survived him. In the *Wharton Peerage* (3) and the *Shrewsbury Peerage* (4), the recitals in a decree of the Court of Chancery were admitted as evidence of identity in a question of pedigree.

Rigby, for the trustees of the fund.

James, L.J.:—

We are of opinion that it is not possible to admit this document according to the rules of evidence as laid down in this country. Whether other countries act upon the same view as we do it is probably not necessary for us to inquire, nor is it necessary to inquire whether our rules are too strict or not strict enough; but, as I understand it, the universal rule (subject to certain special exceptions) in *England* is, that evidence to be admissible must be given on oath by persons speaking to matters within their own knowledge and liable to be tested by cross-examination. Hearsay evidence, as a general rule, is not admissible, and it is not admissible because one knows to what extent people will be and are disposed to speak untruly, even without any motive whatever, and one knows how little importance can be attached to any rumour or anything stated as mere hearsay. What the document which we are asked to admit in the present case comes to is this: It is a document written by certain gentlemen of *Genoa* reciting the history of a person who had applied for an office under Govern-

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(1) Page 182.

(2) 1873; not reported.

(3) 12 Cl. & F. 295.

(4) 7 H. L. C. 1, 26.

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ment. How is that anything more than hearsay? They say that the gentleman who has applied for the office was a native of such a place, and was of a certain age. That is the purpose for which the document is tendered before us. They were somehow or other told so, or it may be they spoke of their own knowledge, or from what they had learnt there, but that is a statement which does not come within the exception that has been established as to the admissibility of documents. It has been established that such statements and such declarations made by deceased members of a family and before any *lis* has been moved are admissible, but then it is always laid down that such statements are only admissible when made by members of the family. No similar declarations made by the most intimate friends, or made by any person whomsoever except a legitimate member of the family, are admissible in evidence. Therefore this document does not come within that exception.

Then does it come within another exception, which is an entry made by a deceased person of something in the discharge of his duty? The principle of that exception is very well laid down in the case of *Chambers* v. *Bernasconi* (1). There may have been a doubt as to whether the principle was accurately applied to the particular part of the entry which was rejected there, but the principle has never been questioned in any case, and it is this, that it must be an entry, not of something that was said, not of something that was learned, not of something that was ascertained, by the person making the entry, but an entry of a business transaction done by him or to him, and of which he makes a contemporaneous entry. For nothing else was it admissible, and it was received only because it was the person's duty to make that entry at the time when the transaction took place. The exception is entirely confined to that.

Then there is another exception which is with regard to entries made against one's interest. Of course, it cannot be pretended that this document comes within the principle of an entry by a deceased person charging himself with something or making some acknowledgment against his interest. Then what is it? It is a report made by some gentlemen filling a public office in *Genoa*.

(1) 1 C. M. & R. 347.

No doubt it is a report made by them in the discharge of their duty, and in answer to a reference to them on that matter. It is a report made by them to the Government. I have not heard anything to satisfy me that any such report made in this country by a similar department would be admissible in evidence either on authority or on principle. Take the case of a similar document in this country. Suppose an application is made to the Government either for appointment to an office, or for promotion, and the Queen is advised to refer that application to some state department, and the state department makes a confidential report to the Queen, giving a biography of the gentleman who has made the application for the office or for promotion, no such report has ever yet, that I am aware of, been admitted as evidence, and I cannot conceive on what principle it would be admissible. We have not any notion in this case of what the gentlemen making the report proceeded upon. They may have satisfied themselves by statements made or by letters written which we do not know of, but if the report had appended the letters and the statements made, those letters and those statements themselves would not be admissible in evidence on the ground that they were only made by contemporaries and not by relatives, and if those statements themselves would not be admissible as evidence, then the conclusion at which the public department arrived from those statements cannot be put higher than the statements themselves, which are not admissible in evidence. It appears to me that this is sufficient to dispose of the matter.

Some special cases have been referred to as to the practice in the House of Lords before the Committee of Privileges where reports have been admitted for some purpose, but no decision of that Committee has been cited to us that at all comes near this case. One case was cited of the report of the Attorney-General upon a previous Act of Parliament which reversed the attainder of the *Nairne* Peerage; but the only thing I can say with regard to that is, that the fact there was a fact wholly immaterial to support the claim of the claimant of the peerage, because the claimant was claiming through somebody anterior to the marriage mentioned in that report and which was the material fact. There the complainant, in complying with the rules of the House of Lords, had to get rid of all the persons who would be nearer to the root of the descent than the claimant was. The claimant said by such and such a report, made at such and such a time, it appears that a certain person was married. I admit that marriage, and I get rid of that marriage and all the consequences of it by shewing that if that marriage took place all the issue of that marriage have disappeared. That was the sole object in that case to get rid of an obstacle which the House of Lords required to be removed. There was no question of proving the marriage as a fact to make out the title of the claimant by means of that report. Then it was said that the recitals in private bills have been admitted as evidence in Peerage cases when they never would have been admitted in evidence elsewhere. According to the then practice such bills were referred to Judges to take evidence. That seems to me to be very anomalous; such recitals are not admitted now, because no such reference is made to the Judges, and the Judges do not take evidence; but how evidence taken behind a man's back by Judges can be made evidence against a person who is not a party to the inquiry, it is difficult for me to see. In matters relating to a peerage the only persons to be satisfied are the Queen on the one side, and the House of Lords on the other, as to whether the person is or is not entitled to take his seat there. I cannot think that the fact that the recitals in a private Act were admitted as evidence in such a case, or that entries in the Visitation Book were admitted in Peerage cases, which are very exceptional and peculiar cases, justifies us in saying that every report—for it must come to that unless you can draw a distinction—made by a public body to the executive or sovereign of the state upon which that sovereign or executive acts, in giving offices or bestowing promotion, is evidence against persons who are no parties or privies to it of all the facts mentioned therein. If I could have seen my way to assuming or presuming that the statements in this report were statements furnished by the Consul *Mangini* himself, it might have been admissible on that ground; it might have been that it would be taken as an entry of what the gentlemen making the report had done in the course of their duty—that they had in the course of their duty received that statement and taken it down. But in the absence of that it comes to nothing more than a statement made by contemporaries who probably were likely to know what the truth of the case was, and who had no reason to state anything false; but that is not sufficient, as it appears to me, to let in hearsay evidence.

BRETT, L.J.:—

In determining whether anything we are offered in evidence is admissible or not we must always consider what it is offered as evidence of. The report made by the *Giunta* is offered as evidence of an alleged fact, that *Mangini*, who was a consul in *London*, was of a family of *Manginis* at a village called *Quarto*, and was of a certain age. It was offered as evidence of those two facts, and the question before us is whether it is admissible. Now the document in question is a report of the result of inquiries made by certain persons. It is a report of the result of inquiries made by persons who had authority to make those inquiries, and the question therefore is, whether the report of the result of authoritative inquiries is admissible to prove either of such facts as this report was offered in evidence to prove. It was supported, first of all, upon the allegation that it was an entry or report made by persons in the course of their duty and by persons who had no interest at the time they made it to make a false report. Those two allegations are perfectly correct, but the question is whether those two alone without something else are sufficient to make such a report evidence of such facts. The principle of law relied upon is that which is stated first in the case of *Doe* v. *Turford* (1). I will refer to the principle of law there enunciated by Chief Justice *Tindal*. It was desired to prove that a particular notice had been served on a particular day, and the evidence to prove it was an indorsement on the notice by the person who had served the notice that he had served it on a particular day, he being dead, but Chief Justice *Tindal* said: "This evidence was admissible on the ground that it was an entry made at the time"—that is the first condition—" of the transaction"—that is of the transaction which, according to the facts of the case, had been done or effected by the person who made the entry—" and made in the usual course and routine of business by a person who

(1) 3 B. & Ad. 890

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had no interest to misstate what had occurred." There are, therefore, four conditions: 1. That it is an entry of a transaction effected or done by the person who makes the entry; 2. That it is an entry made at the time of such transaction or near to it; 3. That it is made in the usual course and routine of business by that person; and 4. That he was at that time a person who had no interest to misstate what had occurred. After that decision it was attempted in the case of *Chambers* v. *Bernasconi* (1) to put in such an entry made by such a person at such a time, not for the purpose of proving merely the transaction which had been done or effected by that person, but also as evidence of facts stated in the entry which were not the transaction, but which might be connected with it, and in that case of *Chambers* v. *Bernasconi* it was said that you really must confine the evidence in the entry to the transaction, and you must not extend it, although all the other conditions are fulfilled, to collateral matters other than the transaction which the person had effected himself, however cognate they might be to that transaction, and however naturally described in it. That was really no limitation of the doctrine laid down in *Doe* v. *Turford* (2), but it was a refusal to carry that doctrine further than the doctrine itself as laid down by Chief Justice *Tindal;* and that is conclusively pointed out in the case of *Smith* v. *Blakey* (3), where both those cases are explained. Lord *Blackburn* there explains them thus: "The duty must be to do the very thing to which the entry relates, and then to make a report or record of it." That is restating in other words the limitation or the refusal in *Chambers* v. *Bernasconi,* and interpreting Lord Chief Justice *Tindal's dictum* or rule to be confined to the transaction, that is, the duty to do the very thing and then to record it. Mr. Justice *Mellor,* perhaps, puts it even more clearly. He says: "As to an entry in the course of duty, that must be made contemporaneously with the act done, and there must be a duty to do the particular act, and at once to make a record of it." If you apply that doctrine to this case, then it was the duty of those who made this report to report the result of their inquiries, and it was their duty to make an entry, that is, to write the report directly they had come to that result. This report, therefore, might properly be given in evidence to shew, if it were of any use, that the committee had come to a particular conclusion as the result of their inquiry. The only act which they did at the time was to come to a result or determination, but the question whether *Mangini* belonged to the family of *Quarto* was not material for anything which they themselves had to do or which they affected to know. They came to a result with regard, not to that point, but to something else, in truth, that he was a fit person to be appointed as consul. The fact of his ever having been at *Quarto*, or the fact of his being forty-five years of age at that time, was not a thing which they knew, or which they had anything to do with, or as to which they were to make an entry. I think, therefore, that you cannot bring this case within the principle laid down by Chief Justice *Tindal* in *Doe* v. *Turford* (1), which is a recognised principle of the law of evidence, and if you could at all bring it within the principle of *Doe* v. *Turford*, it seems to me that these two particular facts would be excluded by the limitation or the refusal to carry that principle further in the case of *Chambers* v. *Bernasconi* (2), because these two facts were really not material to the purpose of the inquiry. Therefore, even if it could be brought in under *Doe* v. *Turford*, it would be shut out by the case of *Chambers* v. *Bernasconi*. But it seems to me that the objection goes higher than that taken upon the case of *Chambers* v. *Bernasconi*, and that you do not get it within the rule laid down in *Doe* v. *Turford*.

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(1) 1 C. M. & R. 347.

(2) 3 B. & Ad. 890.

(3) Law Rep. 2 Q. B. 326, 333.

That being so, it was very natural and to be expected that an argument should be adduced that this report could be admitted on another and distinct ground of the law of evidence, which is that it is the report of a public authority. Now, in order to make it admissible on that ground, it was said to be a report, or conclusion, or decision of a public authority, and it was said that on that ground, and on that ground alone, it is admissible. Now, the authorities which have been cited in support of that argument are exclusively rulings before Committees of Privilege. First of all the case of the *Nairne Peerage* was cited by Mr. *Pearson*. I think that that case, if there were no other, would be answered by

(1) 3 B. & Ad. 890.

(2) 1 C. M. & R. 347.

what Lord Justice *James* has said, namely, that there the report was not offered as evidence of any fact which it was material for the person who put it in to prove, but it was put in in order that he might, to satisfy the Committee of Privileges, get rid of difficulties that appeared on the face of that report. That would settle that case, I think, but it certainly does not settle the force of the cases of the *Shrewsbury Peerage* (1) and the *Wharton Peerage* (2). It becomes, therefore, necessary to examine those cases rather closely. In those cases recitals in a private Act of Parliament were admitted. I think it cannot be deemed that, as a general rule in ordinary Courts of Law, a recital of certain facts in a private Act of Parliament is not admissible as evidence of the truth of those facts against persons not parties to the private Act of Parliament. That cannot be disputed, but in these cases of peerages recitals in certain private Acts are admitted. Even these recitals in other private Acts are not admitted. Then one must examine the ground on which these recitals are admitted. Now, I will take that which was said by the Lord Chancellor in the *Wharton Peerage* (3): "It is very strong proof, for it is the well-known practice of this House not to allow the insertion of such a statement in the recitals of a private Act of Parliament, unless the truth of that statement has been previously proved to the satisfaction of the Judges to whom the bill has been referred." Mr. *Taylor*, in his book on Evidence dealing with this case, states the rule thus, and rightly states it. He construes the word "for" as "because," and he says that "In those cases, before a Committee of Privileges, recitals in a private Act with regard to a peerage are admitted, because at that time"—that is, at a certain period—"no recital was allowed unless proved to the satisfaction of the Judges." Now, if that be laid down as a general principle, it seems to me that it would allow the giving in evidence of the evidence on a trial before the Judge and jury in an action to which the person against whom the evidence is offered was no party and was not privy. It is known law that you cannot do that. You cannot offer the fact of certain facts having been accepted by the Judge and jury as proved as evidence in any action of the truth of those facts as against persons who were not privy to that action. The rule, therefore, which applies in the Committee of Privileges cannot be a general rule, because it is stated in terms which would comprise cases in which it is known the Courts would not admit the evidence. Then how is that rule to be dealt with? It seems to me that it must be dealt with as an exceptional case, and that it is a rule laid down to be observed before a Committee of Privileges, and in no other case and before no other tribunal. If that be so, of course the rule is no authority for the purpose which we have in hand, which is a matter before an ordinary Court of Law.

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(1) 7 H. L. C. 1.

(2) 12 Cl. & F. 295.

(3) 12 Cl. & F. 302.

Then it is true that the Visitation of Heralds under a royal commission has been admitted in cases of pedigree before a Committee of Privileges, but I cannot help thinking that that also is exceptional and confined to that tribunal, and that a Visitation of Heralds would not be admitted in any Court of Law as evidence of facts stated in the report of the Heralds, or stated in the Heralds' Books. It seems to me that those authorities are confined to the tribunal of the Committee of Privileges, and that they obviously are not authorities for dealing with any document or with any head of evidence in Courts of Law, and that, therefore, this evidence which is pressed upon us as evidence of the facts to which I have alluded, is not brought within any rule of evidence which is known to us, and we have no right to make a new rule at this time upon an entirely new principle, although we might apply an old and recognised principle to new facts. This would be to introduce a new principle. There is no authority for doing that, and therefore I think that this document, however interesting, ought to be rejected.

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COTTON, L.J.:—

I have come to the same conclusion. For the purpose of considering whether the document is admissible, of course it is necessary to consider for what purpose it is tendered in evidence. I am not at all prepared to say that circumstances might not exist under which it would be competent for us to look at this document. For instance, if it were desired to connect the person who was appointed diplomatic agent with the consul, it might be that this document would be admissible in evidence for the purpose of ascertaining whether or not they were the same persons. But it is conceded, and admitted as clear, as I understand it, that the person who was consul in *London* did apply to be appointed diplomatic agent, and it is not to prove the identity of the person appointed as diplomatic agent with the person who filled the position of consul that the document is tendered, but for the purpose of shewing that the man who was consul, and who was afterwards diplomatic agent, had been born at a particular place, and was of a particular age in the year in which the report was made, in 1789 or 1790. Is the document admissible as evidence of a fact stated in the report? I will only deal—and I shall do that very shortly after the full judgment which has been given by Lord Justice *Brett*, with which I entirely agree—with two points on which it is said we are to receive this document.

It was first put by Mr. *Pearson* on the principle upon which contemporaneous entries of facts made by persons who have done an act in the discharge of their duty, and made an entry of the fact, are admissible in evidence. But here the principle clearly cannot apply. Mr. *Pearson* said that there were competent persons to make this report, and that the entry of the fact in the report would be admissible on that principle; but that really is a misapplication of the words "competent persons." When that expression is used it means that if a person in the discharge of his duty does an act, and it is part of his duty to make an entry of it, he is a competent person to make that entry, because he has himself done the act which he records, and it is part of his duty to make that entry, and it is that case to which the principle applies, which can have no application to the present, when what is attempted to be proved by an entry in this report is not any official act done by these commissioners, or by this department of Government, but something which was the result of inquiries made by them as to a fact not within their knowledge, a fact not contemporaneous with their report, but something which they think they have ascertained from some source the nature of which we do not know.

The more difficult question, to my mind, is this: whether or no this report could be admissible on the ground of being the result of an inquiry made by a public authority. But with regard to the admissibility of such a document it cannot be said, in my opinion, that the rules of evidence established in *England* would entitle the Court to look to every result of an inquiry directed by a public authority. The rule is stated by Mr. *Phillips* in his book on Evidence (1) in this way, and I think correctly: "The last species of judicial writings upon the admissibility and effect of which it is necessary to advert to with any particularity are inquisitions. These contain the result of inquiries, made under competent public authority, concerning matters in which the public are concerned. In some cases, indeed, such inquisitions relate to private affairs, as, for example, the particulars of the estate of a deceased individual or of his pedigree. Still, if the inquiry has been made with a view to ascertain the rights of the Crown in regard to such private matters, the inquisition is to be considered as of a public nature for the purposes of evidence." It is not necessary to go through all the different kinds of documents to which he refers, but I may deal with one which is perhaps more difficult than any other, namely, Heralds' Visitations. If those are admissible in Courts of Law—for the practice of the Committee of Privileges of the House of Lords appears rather exceptional—as evidence of such a fact as we are here asked to receive this report to prove, it must be on the ground that they are inquiries with reference to which the Crown was interested in this sense, for the purpose of seeing whether or no certain persons did rightfully claim to hold certain titles and dignities, or to hold certain estates to which the Crown would otherwise be entitled, or something of that kind. It is difficult to explain exactly on what principle they are admitted. Certainly this document cannot come within the principle enunciated there by Mr. *Phillips*, as being a matter of inquiry relating to a subject of public interest, because, even although it was essential for the public interest to ascertain whether *Antonio Mangini* was a Genoese subject or not, it can hardly be said to be a matter of public interest to ascertain whether he was born at *Quarto* or at *St. Ilario*, two places, as I understand, equally within Genoese territory. Then there is another class of evidence which has been referred to particularly, the recitals in private Acts of Parliament. Those, no doubt, were received formerly in Peerage cases as evi-

(1) 10th Ed. vol. ii. p. 125.

dence of the statements contained in them so far as they referred to the pedigree. As far as my experience has gone in Peerage cases the Committee of Privileges were particularly strict in seeing that clear and direct evidence was given of everything to be established before them. But still one must recollect that they were really advising the Crown whether or no the Queen could confer a dignity on a particular claimant. There were no litigant parties, and the Committee of Privileges always refused to hear any one who said, "I appear to oppose; I am the person interested in opposing." They do not recognise litigation between adverse claimants, but persons claiming may come there to call the attention of the Committee to any link of evidence which according to law ought not to be considered as satisfactorily made out. It may well be in those cases that if there is a recital in the Act of Parliament, subject to the exception which I will mention, on which the Legislature has acted, that would be sufficient ground for justifying the Committee of Privileges in advising Her Majesty to act upon that in calling the claimant to the House of Lords as a peer. But it must be remembered that that is only done where the recitals in the Act are of a matter that has been referred to the Judges—to our Judges or to the Scotch Judges—and where they have examined into the matter, receiving evidence on oath, and it is only where there has been that safeguard that the Committee of Privileges looks to the recital in the private Act of Parliament as sufficient to justify them in advising Her Majesty as to what is to be done as regards the claim of a particular person. But it was said by Mr. *Pearson* that in the case of the *Nairne Peerage* there was something more than that, there was the report of the Attorney-General finding that the recitals in an Act of Parliament reversing the attainder of Lord *Nairne* had been proved, and that had been admitted in evidence. There was the recital in the Act of Parliament on which the attainder was reversed, and a particular person, Colonel *Nairne*, I think, on that became entitled to the peerage. That was on the footing of a certain marriage of an ancestor of his. Then that being so, and there having been an apparent failure of that family, another person, a collateral relation, a descendant of an uncle or great-uncle of Colonel *Nairne*, came to the House and asked the Committee of Privileges to advise Her Majesty that he had made out his claim to the peerage. I take it that the report was put in in that case for the purpose of shewing on what footing it was that Colonel *Nairne* had obtained the Act of Parliament reversing the attainder, and it was not for the purpose of proving a link in the pedigree of the claimant, except by shewing that the last peer was so and so. Then the claimant said, "Taking him to be the last peer, I am now entitled, because he became peer on the footing that he was descended from the elder brother of my ancestor through a particular marriage, and I shew that all those who are said to be the issue of that particular marriage are gone, and now therefore it goes down to the next *stirps*, the *stirps* of the next brother." Therefore the report of the Attorney-General was not admitted as establishing a link in the direct pedigree of the claimant, but for the purpose of shewing, assuming the last peer to have been properly there, that all those who upon that footing stood in priority to the claimant were out of the way, which distinguishes it entirely from the present case. In my opinion we should be introducing a novelty into the law of evidence if we were to admit this report, and although we should be desirous of receiving everything which could possibly give us information in this case as to which of the different claimants is entitled, in my opinion we should be acting contrary to the rules of evidence if we admitted this report; and, therefore, I agree that it must be rejected.

JAMES, L.J. :—

I wish it to be distinctly understood, in order that there may be no misapprehension on the part of the Italian Government, that we reject this document on exactly the same grounds as we should feel ourselves bound to reject a similar document emanating from a similar body in this country. I may observe that we are not allowed to look at the original document, except with a reservation which it is quite clear we could not comply with unless we agreed to abdicate our duty or not to do our duty in this case. I have before me a letter from an Italian official which says: "I have, therefore, to request you will inform me at your earliest convenience whether the Court of Appeal will receive and take charge

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of the document on the condition reserved by the Italian Government, that the question of its authenticity if raised shall not be entered into and adjudicated upon by the Court." It is obvious that we could not accept any document upon such a condition as that.

J. Pearson, Q.C., said that the document which the Court had decided to reject was so important to the Appellant's case that he felt it would be useless to rely upon the other evidence.

THE COURT accordingly dismissed the appeal with costs.

Solicitors: *Lowless & Co.; Foster & Spicer; G. L. P. Eyre & Co.*

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[1873 P. 162.]

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[1876 S. 353.]

Dismissal of Bill—Injunction pending Appeal to House of Lords.

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A decree was made in three suits for the administration of the personal estate of an intestate, directing the usual inquiry as to her next of kin. A certificate was made finding five persons of the name of *F.*, who were resident abroad, to be the next of kin, and an order was made for distribution of the fund in Court among them. *S.*, who had not been a party to the proceedings, applied by motion to stay the distribution of the fund, alleging herself to be next of kin. The Vice-Chancellor suspended the giving out of the order, and directed his Chief Clerk to inquire whether *S.* had made out a *primâ facie* case, and the Chief Clerk finding that she had not, the Vice-Chancellor directed the order to be given out without prejudice to any independent proceeding by *S.* Four of the five shares were at once transferred to four of the persons found entitled; the fifth remained in Court. Two of the shares which had been transferred were sold out, and the proceeds received by the vendors. *S.* then commenced an action, and obtained in it an order granting an injunction to restrain any dealing with the three shares which had not been sold, and directing an inquiry who were the next of kin, and this order was subsequently directed to be taken as made in the three suits as well as in the action. The Chief Clerk again found the *F.* family to be the next of kin. The action and a summons to vary the certificate were heard before the Vice-Chancellor, who dismissed the summons and the action, but continued the injunction in the three causes until further order. *S.* appealed, and the Court of Appeal affirmed the decision of the Vice-Chancellor dismissing her bill, but *S.* being about to appeal to the House of Lords:—

Held, that as, if *S.* ultimately succeeded in the House of Lords, her success would be useless unless the fund was protected in the meantime, the injunction ought to be continued pending the appeal.

IN December, 1871, *Maria Mangini Brown*, widow, died intestate, entitled to a very large personal estate. Letters of administration were taken out on behalf of the Crown. In March, 1873, a suit of *Lane* v. *Gray* was instituted by a person claiming to be one of Mrs. *Brown's* next of kin, and in September, 1873, a similar suit of *Polini* v. *Gray*, and in the same year another similar suit of *Prando* v. *Gray, In re Brown.* On the 19th of December, 1873, a decree was made in the three suits for the administration of the estate of Mrs. *Brown*, with an inquiry who were her next of kin.

In March, 1876, a certificate was made finding five persons, who may be spoken of as the *Freccias*, and who were resident in *Genoa*, to be the next of kin. On the 20th of July, 1876, Vice-Chancellor *Malins* made an order in the three suits for the division of the funds in Court in fifths among the persons thus found to be the next of kin, or their legal personal representatives.

On the 27th of July, 1876, Madame *Sturla* and others who alleged themselves to be the next of kin, but had not yet taken part in the proceedings, applied by motion in the three abovementioned suits to stay the distribution of the fund. The Vice-Chancellor suspended the giving out of the order, and by arrangement an informal reference was directed to the Chief Clerk to report to the Vice-Chancellor whether Madame *Sturla* had made out a *primâ facie* case. On the 7th of August, 1876, the Chief Clerk reported to the Vice-Chancellor that Madame *Sturla* had not made out a *primâ facie* case, and on the 8th of August the Vice-Chancellor directed the order of the 20th of July, 1876, to be given out, but without prejudice to any independent proceeding by Madame *Sturla.* The order was forthwith acted upon, and the shares of four out of the five persons found to be next of kin were transferred out of Court into their names. The transferees of two of these shares sold them, and received the proceeds. The two other of these four shares remained standing in the names of the transferees. The fifth of the next of kin had died, and her share was carried over in Court to the account of her personal representative.

On the 18th of September Madame *Sturla* applied to the vacation Judge to restrain the parties from dealing with the three shares which had not been sold out, and an order was made accordingly by Baron *Huddleston*.

On the 18th of October, 1876, Madame *Sturla* and other persons claiming under the same title commenced the action of *Sturla* v. *Freccia*, and on the 16th of November Vice-Chancellor *Malins* made an order in that action granting an injunction to restrain the dealing with the above three shares which had not been sold out, and directing that, notwithstanding the above-mentioned certificate of the Chief Clerk, an inquiry should be directed who were the next of kin of Mrs. *Brown*. On the 3rd of February, 1877, an order was made by Vice-Chancellor *Malins*, on the request of the counsel for the *Freccias*, that the order of the 16th of November, 1876, should be intituled, or deemed and taken as intituled, in the three suits as well as in the action.

On the 27th of May, 1878, the Chief Clerk made his certificate under the above inquiry, finding that Madame *Sturla* and her co-Plaintiffs were not among the next of kin. Madame *Sturla* and her co-Plaintiffs took out a summons to vary this certificate. The summons and the action of *Sturla* v. *Freccia* were heard before Vice-Chancellor *Malins*, and on the 22nd of February, 1879, his Lordship made an order dismissing the summons and dismissing the action of *Sturla* v. *Freccia*, but continuing the injunction in the other three suits until further order.

On the 7th of July, 1879, an appeal by Madame *Sturla* from the last-mentioned order was dismissed by the Court of Appeal, the Court intimating that the result would be that the injunction must be discharged, but it being intimated that an appeal to the House of Lords was intended, the Court directed that the order should not be drawn up for a week.

On the 23rd of July, the order made on the appeal not yet having been drawn up, the Plaintiffs in *Sturla* v. *Freccia* applied to the Court of Appeal to have the injunction continued pending an appeal to the House of Lords. The application was heard by *James*, *Brett*, and *Cotton*, L.JJ., and was put into the paper again to be more fully argued on the question of jurisdiction before four Judges.

J. Pearson, Q.C., and *E. Beaumont*, for the Plaintiffs in *Sturla* v. *Freccia*:—

There is no ground of principle for saying that a dismissal of an action so extinguishes it that no order can be made in it, and the practice of the Court is the other way. *Newby* v. *Harrison* (1) is in favour of the jurisdiction. In *Oddie* v. *Woodford* (2) Lord *Eldon* made an order dismissing the bill unless the Plaintiff should appeal to the House of Lords within a limited time. That is in substance what we want here. The ultimate result of that case appears in *Seton* on Decrees (3). In *Harrington* v. *Harrington* (4) Lord *Cairns* lays down the principle that the property will be kept so that the person who is ultimately successful may have it.

[JAMES, L.J.:—Suppose a foreigner has money in the funds, and another person brings an action to establish a title to it. The Court of first instance says that the claim fails, and the Court of Appeal affirms this decision. Is the foreigner to be deprived of his money till the case has been decided by the House of Lords?]

There is a great difference between dealing with a fund which was originally in the hands of one of the litigants, and dealing with a fund which was originally *in medio* and has been awarded by the Court to one of the litigants. The distinction is shewn in *Atherton* v. *British Nation Assurance Company* (5).

[JAMES, L.J.:—Here the fund as to the greater part of it has actually come to the hands of the parties. It is not a mere matter of history how it came to them?]

Price v. *Salusbury* (6) is precisely in point as to the jurisdiction to grant an injunction after dismissal, as is *Corporation of Gloucester* v. *Wood* (7). We ask to have the order on appeal, which has not yet been drawn up, put in such a form as to protect the fund pending our appeal to the House of Lords.

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(1) 3 D. F. & J. 287. [illegible]

(2) 3 My. & Cr. 584, 625.

(3) 3rd Ed. p. 1162.

(4) Law Rep. 3 Ch. 576.

(5) Ibid. 5 Ch. 720.

(6) 11 W. R. 1014.

(7) 1 Ph. 493.

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Higgins, Q.C., and *Everitt*, *contrà* :—

As against the Plaintiffs in *Sturla* v. *Freccia* the matter was *res judicata*, for they had come in under the three earlier suits, and the new action is in the nature of a bill of review filed without leave of the Court.

[JESSEL, M.R. :—That objection cannot be maintained. The order of the 20th of July, 1876, was given out without prejudice to any independent proceedings by Madame *Sturla*, and she is not bound by the proceedings in the causes.]

Apart from that point the case is governed by *Walburn* v. *Ingilby* (1). In *Galloway* v. *Corporation of London* (2) it was held that after a simple dismissal of the bill the Court had no jurisdiction.

[JESSEL, M.R. :—The statement in the argument of that case that the order in *Price* v. *Salusbury* (3) was by arrangement is quite erroneous; it was bitterly fought. The Master of the Rolls offered me the order on terms, and I accepted them. They were terms offered by the Court, not by the other side.]

Oddie v. *Woodford* (4) does not support the applicants' case, for the dismissal was only conditional. *Newby* v. *Harrison* (5) was a case of personal undertaking which gave the Court jurisdiction. In *Simpson* v. *Westminster Palace Hotel Company* (6) Lord *Campbell* refused a similar application.

[JESSEL, M.R. :—That case, in which I was counsel, is no authority either way. The motion was not in fact refused. The Government was the substantial Defendant, and Lord *Campbell* undertook to move the Committee of Appeals to advance the appeal and hear it at once, which was done, so that it was unnecessary to decide on the application.]

Galloway v. *Corporation of London* is an express authority in our favour.

[JESSEL, M.R. :—The difficulty of Lord Justice *Turner* there was that the Appeal Court had dismissed the bill without any reservation.]

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(1) 1 My. & K. 61.
(2) 3 D. J. & S. 59. 11 Jur NS 587
(3) 11 W. R. 1014.
(4) 3 My. & Cr. 625.
(5) 3 D. F. & J. 287. 7 Jur NS 1054
(6) 1860; not reported.

The Court has done so here, and there is no jurisdiction to rehear.

[JESSEL, M.R.:—As the order of the Court of Appeal has not been drawn up there is no question of rehearing.]

The case of *Corporation of Gloucester* v. *Wood* (1) is not important in the present case, for there the fund was in Court.

Bagshawe, Q.C., and *Eyre*, for other parties.

JESSEL, M.R.:—

The question before us is this: An action is brought to determine the rights of claimants to a fund. The Plaintiffs fail in the Court of first instance and in the Court of second instance, but are about, *bonâ fide*, to prosecute an appeal to the Court of ultimate resort. The Plaintiffs allege that that appeal will be nugatory if the fund is paid out to the Defendants, and that if the Plaintiffs should ultimately succeed in the House of Lords, that success will be useless to them unless an interim order is made for preserving the fund. I say they so contend, and, assuming that contention to be correct in fact, the question is, whether this Court has jurisdiction to prevent such a consequence. It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success. That principle, as it appears to me, applies as much to the Court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the Court of last instance before the hearing of the final appeal. The rule under the *Judicature Act* is rule 3 of Order LII., which is this: "It shall be lawful for the Court or a Judge upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property being the subject of such action."

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(1) 1 Ph. 493.

The terms in which the jurisdiction is conferred are general and unlimited. How that jurisdiction should be exercised is a question of judicial discretion which must be guided by proper rules founded on principle. It is not every case in which the Court or Judge should interfere. It is not to be said that when a party litigant has succeeded in two Courts he is to be in the same position as if he had never succeeded at all. In my opinion it requires a stronger and more special case to induce the Court to interfere against him on behalf of the other party than would have been required if there had not been any trial of the action. I am by no means disposed to lay down the rule that this Court should interfere pending an appeal to the House of Lords, simply because it would be the duty of the Court of first instance to interfere before the action was tried at all.

I think that the authorities, so far as they have decided this point, are all consistent with the view I take of the jurisdiction of the Court. Some of them go far beyond what is necessary for this purpose. I may mention especially *Price* v. *Salusbury* (1), a decision of the late Master of the Rolls, which goes to a very great length. But there are some cases very similar to this. The case of the *Corporation of Gloucester* v. *Wood* (2) is very similar. There a fund forming part of a testator's estate was brought in by his executors under an order of the Court by reason of a claim of the Corporation of *Gloucester*. That claim failed, and then in the ordinary course the fund would have been restored to the persons who paid it in, and not the less so because the executors who paid it in happened also to be residuary legatees. But although the claim failed, and it failed twice, the Lord Chancellor ordered the fund to be retained. This is a clear authority in favour of the jurisdiction.

It is no doubt a strong point against the jurisdiction, or the exercise of it, that the fund has actually got home, so to say, having reached the hands of the claimants whose title has been upheld by the Court of Appeal. We must, however, consider the very special circumstances of this case. How did they get the fund, and in what character do they hold it? They got the fund as claiming to be the next of kin of a Mrs. *Mangini Brown*, and they got it under a decision of the Court of Chancery by which they were found to be next of kin, a decision which no doubt will protect the administrator who paid over the fund; but if the present claimant can shew that this decision was erroneous, and that she is the next of kin, then the trust fund will have been paid over by the administrators to the wrong parties, who will be simply trustees for her, and she has the right to follow the money. It is therefore the case of a claimant who alleges that she is *cestui que trust* of a fund against persons who, if she is right, hold it as her trustees, and she says, Keep that fund safely till my rights are finally determined. The Court having arrived at the conclusion that the appeal is *bonâ fide*, that she intends to prosecute it with a view to determine her rights and to get a final decision on those rights; and the Court, I assume (for I do not know the facts), being satisfied that there would be danger, if it were not to interfere for the interim protection of the fund, of its not being forthcoming if she succeeded in the House of Lords, the question is, is it not the duty of this Court to say that the fund ought to be preserved for the successful party? Looking at the facts of this case, not forgetting the amount in dispute, and remembering the peculiar circumstances under which the fund was obtained, I think it would be right so to mould the order of the Court of Appeal as to keep the fund safe until the decision of the House of Lords is obtained. It must not be supposed from what I have said that I consider such an order to be by any means of course, or one that ought to be made except under very special or peculiar circumstances; but I think that when those special and peculiar circumstances exist the jurisdiction ought to be exercised.

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(1) 11 W. R. 1014.

(2) 1 Ph. 493.

JAMES, L.J.—

I had when the case was before us on the former occasion some misgiving which has led to this further argument to-day, and I am not yet entirely free from misgiving, not so much as to whether it is right or wrong to make an order in the present case, but as to whether the making such an order may not be a dangerous precedent and likely to lead to great mischief. What I have been afraid of is that it may be said to be a precedent for holding that if any one applies for an injunction and obtains it the injunction

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ought to be kept up as long as he can keep the litigation alive. If, however, it is distinctly understood that, as stated by the Master of the Rolls, the granting such an injunction pending an appeal is a thing to be done only under very special and exceptional circumstances, then probably the danger that I have been afraid of will not exist. Certainly, having regard to the cases cited to-day, I cannot adhere to my doubt as to the existence of the jurisdiction.

Brett, L.J.:—

It seems to me it has been proved that this Court has jurisdiction to grant the order asked for.

Cotton, L.J.:—

I am of the same opinion. The only question we have to consider is, whether or no the Court has jurisdiction in a proper case to stay all dealings with a fund pending an appeal to the House of Lords although the Court has decided against the title of the Plaintiff and dismissed the action. I see no difference in principle between staying the distribution of a fund to which the Court has held the Plaintiff not to be entitled, and staying the execution of an order by which the Court has decided that a Plaintiff is entitled to a fund. In that case, as in this case, the Court, pending an appeal to the House of Lords, suspends what it has declared to be the right of one of the litigant parties. On what principle does it do so? It does so on this ground, that when there is an appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree or the distribution of the fund would make the appeal nugatory, that is to say, would deprive the Appellant, if successful, of the results of the appeal, then it is the duty of the Court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights. That applies, in my opinion, just as much to the case where the action has been dismissed, as to the case where a decree has been made establishing the Plaintiff's title.

I think, therefore, that there is jurisdiction to do what we are asked to do. This jurisdiction ought, no doubt, to be very carefully exercised, and so as not to encourage any one to present an appeal for the mere purposes of delay. It is needless to repeat what the Master of the Rolls has said, that the fact of the Appellants having failed twice must be taken into account. We are now simply considering whether in a proper case there is jurisdiction to make such an order as the Appellant in the present case asks us to make, and I am of opinion that there is.

The order on the appeal from the order of the 22nd of February, 1879, was accordingly directed to be drawn up as follows:—

This Court doth order that the said order dated the 22nd February, 1879, be affirmed, but the Defendants *P. T. M. Freccia*, &c., are to be liberty to apply to discharge so much of the said order as relates to the continuation of the injunction as thereby continued, if a petition of appeal to the House of Lords be not presented and proceeded with without delay.

Solicitors: *Lowless & Co.; Foster & Spicer; G. L. P. Eyre & Co.*

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July 2.

In re LLOYD.
ALLEN *v.* LLOYD.

[1878 L. 122.]

Receiver — Appointment of Member of Firm of Plaintiff's Solicitors to be Receiver.

A., who was a member of a firm of solicitors, was appointed executor of a will, probate of which was contested. Immediately after the testator's death *A.* commenced against his widow an action in the Chancery Division to administer his estate, the writ in which was by leave of the Court amended by asking for a receiver pending the litigation in the Probate Division. *A.*'s firm appeared for both the Plaintiff and Defendant in the Chancery action, and an order was made appointing *A.* to be receiver of the personal estate until the decision of the Probate action, and also to receive the rents of the real estate, the only security ordered being the payment of £2000 into Court, though the rents were about £3500 per annum. The widow afterwards obtained an order to change her solicitors, and moved to discharge *A.* from being receiver. She denied having given the firm any authority to appear for her, and it was established, at all events, beyond doubt that she had never sanctioned the appointment of *A.* as receiver:—

Held, by the Court of Appeal, that the appointment of *A.* as receiver was improper, for that the appointment of a member of the firm of the Plaintiff's solicitors to be receiver makes it impossible to secure the proper checking of the receiver's accounts, and that a party to the action ought not, except in an extreme case, to be appointed a receiver without the assent of the other party.

A. was accordingly discharged from being receiver and ordered to pay the costs both in the Appeal Court and in the Court below.

JOHN DAVIS LLOYD died on the 1st of May, 1878, having made several wills, of the last of which *Allen* was appointed executor. On the 4th of May a caveat was entered. On the 6th of May *Allen* issued his writ in this action in the Chancery Division against *Lloyd's* widow as Defendant, asking for administration of the testator's estate. *Allen* shortly afterwards issued a warning to the caveat. On the 11th of May a motion was made by the Plaintiff in the Chancery action for a receiver. The firm of solicitors in which *Allen* was a partner appeared both for him and Mrs. *Lloyd* in the action. Vice-Chancellor *Malins* gave leave to amend the writ by asking for the appointment of a receiver pending the litigation in the Probate Division, and made an order appointing *Allen* to receive the rents and profits of *Lloyd's* real estates, and also, until either a will of *Lloyd* should have been proved or he should have been held to have died intestate and letters of administration should have been granted, to collect and get in his outstanding personal estate. Directions were given as to his bringing in his accounts and paying in balances, and it was ordered that he should, before the 18th of May, 1878, pay into Court to the credit of the action to an account to be intituled "Receiver's security account" the sum of £2000, he submitting and undertaking to do so instead of giving security according to the course of the Court.

There was evidence that the rents of *Lloyd's* real estate were about £3500 per annum. The amount of his personal estate did not appear.

The writ was amended on the 13th of May pursuant to the leave given by the Vice-Chancellor, but the order for the receiver was not post-dated.

An administrator *pendente lite* was subsequently appointed in the Probate Division, and was added as a Defendant in the action.

Mrs. *Lloyd* obtained an order in the action to change her solicitors, and applied to discharge *Allen* from being receiver. The motion was made before Mr. Justice *Fry*, who declined to interfere, and Mrs. *Lloyd* appealed from this refusal. She deposed that she was not aware of the institution of the action until after the appointment of a receiver had been made, and that *Allen's* firm had no authority to appear for her.

Higgins, Q.C., and *Kingdon*, for the appeal:—

We apply first on the ground that Mrs. *Lloyd* did not know of the existence of the action, or that *Allen's* firm appeared for her.

[JESSEL, M.R.:—Your remedy for that is not by way of appeal, but to apply that the appearance may be discharged and the solicitor pay the costs.]

Then we say that the order for a receiver was irregular, for it was made in an action asking for administration only, and which was not brought into proper form till after the date of the order: *Rowsell* v. *Morris* (1); *Barton* v. *Rock* (2); and, lastly, the appointment of the Plaintiff himself, who was one of the firm of solicitors by whom he appeared, to be receiver was most improper: *Garland* v. *Garland* (3).

North, Q.C., and *Everitt*, for the administrator *pendente lite*.

Glasse, Q.C., and *De Castro*, for *Allen*.

JESSEL, M.R.:—

In the observations I am about to make I do not desire to prejudice in the slightest degree the trial of the action in the Probate Court. I decide this case exactly as if there were no such probate action pending, and wholly irrespective of the merits of it, which, I think, do not come into question in deciding the point that is now before us.

I will state the only facts which appear to me for this purpose material. Mr. *Allen*, a partner in the firm of Messrs. *Eyre & Co.*, solicitors, was appointed the executor of a will which has been dis-

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(1) Law Rep. 17 Eq. 20.

(2) 22 Beav. 81, 376.

(3) 2 Ves. 137.

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puted. I do not for the present purpose inquire whether he did or did not take any beneficial interest under that will. I simply state that he was appointed executor. Being so appointed executor, and the will being disputed, a writ was issued, no doubt in wrong form, because, though probate had not been granted, it asked simply for the administration of that testator's estate. But I do not rely upon the form of the writ, because when a motion was made for a receiver before Vice-Chancellor *Malins* it was pointed out that the order could not be made under that form of writ, and with the leave of the Vice-Chancellor the writ was amended so as to add to it a claim for what I will call the appointment of a receiver *pendente lite* both of the real and personal estate of the testator or intestate according to the event of the action in the Probate Court. The Defendant was the widow of the testator, who in case of intestacy of course would have an interest, and who, we are told, would in case of testacy, whichever will might be supported, have an interest in the personal estate, and if one of the wills were supported, would have an interest in the real estate also. The solicitors for the Plaintiff were the firm of Messrs. *Eyre & Co.*, in which Mr. *Allen* was a partner, though his name does not appear in the name of the firm. The same firm were also the solicitors of the widow. There is a question whether or not they were authorized by her to represent her; but there is no question that what was done at the hearing of the motion, namely, the appointment of Mr. *Allen* as receiver, was not done with her knowledge or express authority. When the motion came on before the Vice-Chancellor he was asked to appoint, and he did appoint, Mr. *Allen* as receiver, and he not only appointed him receiver, being the Plaintiff in the cause, but appointed him receiver without the usual security. There is evidence that the real estates are worth about £3500 a year (what the value of the personal estate is I do not know), and the only security ordered was that he should pay into Court to the receiver's security account the sum of £2000, which of course he would very soon receive out of the estate, and which would not be, according to the ordinary rules of the Court, a sufficient security, having regard to the value of the property, or rather the amount of the rents which he was to receive.

Now the first thing that strikes any one acquainted with the practice of the Chancery Division is this, that the appointment of one of the firm of solicitors for the Plaintiff as a receiver is an improper appointment, and that the firm should not have asked for or consented to such an appointment. It is so obviously improper that I am only surprised that a firm of the great experience of Messrs. *Eyre & Co.* should have allowed it to take place. It is improper for this simple reason: The duty of the solicitors of the Plaintiff is to check the receiver's accounts. It is so much their duty that as a general rule no one else does so. The solicitor of the Plaintiff attends on the taking of the receiver's account. Now, how is it possible that the firm can properly discharge that duty when one of the firm is himself the receiver? It is obviously a case where his interest will conflict with his duty, and that consideration alone, in my opinion, makes the appointment improper, though I say this without intending to intimate for a moment that any impropriety was desired or intended by the firm when they nominated him.

Then, besides this, it is a settled rule that one of the parties to the cause shall not be appointed receiver without the consent of the other party unless a very special case is made. I will illustrate my meaning as to a special case by referring to *Sargant* v. *Read* (1), where, under special circumstances, I appointed the Plaintiff receiver against the will of the Defendant. But it requires a very strong and special case to induce the Court to do so.

Again, it does not appear to me that the fact of Mr. *Allen* being a partner in the firm of Messrs. *Eyre & Co.* was present to the Vice-Chancellor's mind. Assuming that it was known to him that Messrs. *Eyre & Co.* represented the Defendant as well as the Plaintiff, that does not appear to me to make any difference in what, I am afraid, I must call the dereliction of duty on the part of the firm as solicitors for the Defendant. If there had been independent solicitors for the Defendant, they, of course, would have pointed out to the Vice-Chancellor that he was appointing one of the firm of the solicitors for the Plaintiff, and that such an appointment was not proper; but it was not the less the duty of the Defendant's solicitors to point that out because they happened to

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(1) 1 Ch. D. 600.

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be also the solicitors of the Plaintiff. The case illustrates the difficulty of acting on both sides. I have no doubt that this firm, who are by no means remarkable for want of intelligence, or of acuteness, or of knowledge of the conduct of business, would not have allowed such an appointment to be made without pointing out the objection, if they had been the solicitors for the Defendant and another firm had been solicitors for the Plaintiff. In all I am saying I deal with the case quite irrespective of any merits with regard to the will in question, with which I have nothing to do. I confine myself entirely to the conduct of the Plaintiff as a member of the firm of Messrs. *Eyre & Co.* in obtaining this appointment of a receiver, which was irregular in form and in substance and ought not to be retained. To allow such appointments would to a great extent destroy the value of the appointment of a receiver, which greatly depends on the watchfulness of the solicitors of the Plaintiff over his course of conduct and his accounts. On that ground, and on that ground alone, I wish to say (without imputing, and I do not think it necessary to impute, anything intentionally wrong to the firm of Messrs. *Eyre & Co.*) that the order was so improper that we ought not only to discharge Mr. *Allen* from being the receiver, but to make him pay the costs both below and in this Court.

BRETT, L.J. :—

I am of opinion that in the conduct of legal proceedings solicitors and counsel are not merely bound to act with faith and honour, but with a scrupulous nicety of conduct which may not even appear to shew the least breach of either faith or honour, and it seems to me that, considering the position of Mr. *Allen* and the position of his firm with regard to this suit, there was, to say the least, a sad want of propriety in what was done. It seems to me that the firm, of which Mr. *Allen* was a member, appearing for this widow, ought to have resisted any application that Mr. *Allen*, either at his own wish or at the suggestion of anybody, should be appointed receiver. It seems to me that even if the other members of the firm had desired Mr. *Allen* to be appointed receiver, he himself ought to have resisted such an appointment, and that his appointment by the consent of his firm, without the express assent of this lady, was contrary to the decent administration of justice. I therefore quite agree that the Court ought to mark its sense of his conduct by making him pay all the costs here and below.

COTTON, L.J.:—

Before I say anything else I think it right to state that I have not before me any of the facts connected with the will which is in dispute in the Probate Court, and therefore I have not in my mind any opinion against that will. Not only do I so say, but I express my opinion that our decision on the motion before us ought not in any way to prejudice those who propound the will in the Probate Court.

Then comes the question, what order ought we now to make? I am of opinion that the receiver ought to be discharged, and in saying that, and in the reasons which I will give for saying it, I do not impute either to the Plaintiff or to the firm of which he is a member any intention to do what in their mind was wrong, but it is of the greatest importance that the Plaintiff's solicitors should be in a position effectually to check the accounts of the receiver, and if the receiver is a member of their firm it is almost impossible that the accounts can be checked in the way in which the Court has a right to expect them to be checked. On that ground, which is quite a sufficient ground in my opinion, this receiver ought to be discharged. In consequence of the appearance for the Defendant being by the firm of solicitors who acted for the Plaintiff there was no check on the proposal to appoint Mr. *Allen* receiver, and the objections to such an appointment were not brought to the attention of the Vice-Chancellor. Mrs. *Lloyd*, who now appears by different solicitors, although bound by the appearance entered for her by her former solicitors, is still entitled to say "That supposed assent of mine was not made with my knowledge, but by persons whom I must treat as acting for me, but who gave an assent which they were not justified in giving without express authority from me, and they had none such." In my opinion the party moving is not bound by such an assent, and the appointment of a member of the firm of the Plaintiff's solicitors being an improper appointment ought to be discharged; and

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without imputing any intentional misconduct to the Plaintiff, or the firm of which he is a member, I agree with the rest of the Court that our order must be to make him pay the costs of the motion both below and in this Court.

Solicitors: *Palmer, Bull, & Fry; G. L. P. Eyre & Co.; Crosse, Sons, & Riley.*

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1879
July 4.

WILSON *v.* CHURCH (No. 2).

[1878 W. 81.]

Practice—Appeal to the House of Lords—Staying Proceedings pending Appeal—Rules of Court, 1875, *Order* LVIII., *r.* 16.

Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the Court will not interfere if the appeal appears not to be *bonâ fide*, or there are other sufficient exceptional circumstances. And when the Court makes an order to stay proceedings pending an appeal it will put the Appellants on terms to speed the appeal; and it will not interfere with the execution of the order of the Court below respecting costs, except to put the solicitor who is to receive the costs upon an undertaking to refund them if required to do so.

In a suit by a bondholder of a railway company on behalf of himself and other bondholders, against the company, claiming that the money advanced should be returned, instead of its being applied in the undertaking, judgment was given for the Plaintiff with costs, and it was ordered that the money should be forthwith distributed among the bondholders. The bonds were payable to bearer, and the bondholders were very numerous and many were residing abroad. On the other hand the Defendant company was insolvent, and it was very doubtful whether, if the undertaking was carried on, the shareholders would get any benefit from it.

The Defendants appealed, and moved to stay proceedings pending the appeal:—

Held (*dissentiente James*, L.J.), that there were sufficient grounds to induce the Court to stay the distribution of the fund pending the appeal; and that the special circumstances of the company were not sufficient to prevent the Court from interfering.

THIS action was brought by *W. M. Wilson* on behalf of himself and all other holders of the bonds of the Republic of *Bolivia*, and the Republic of *Bolivia*, against Colonel *Church*, the *National*

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Bolivian Navigation Company, the *Maderia and Mamoré Railway Company*, Messrs. *Lloyd* and *Lambert*, who were trustees for the bondholders, and *L. Nash*, a dissentient bondholder, claiming a declaration that a fund of a large amount in the hands of the trustees should be returned to the bondholders and not applied in the construction of the works or the railway.

On the 20th of June, 1879, judgment was pronounced by the Court of Appeal in favour of the Plaintiff, ordering the trust fund to be distributed among the bondholders, and that the Defendants other than the trustees should pay the costs of the action, the Plaintiff to have his costs in the first instance paid out of the fund.

The Defendants the *National Bolivian Navigation Company* and the *Maderia and Mamoré Railway Company*, and *L. Nash*, proposed to present a petition of appeal to the House of Lords against this judgment. They now moved that on the undertaking by the Defendants to present their petition of appeal within a month all proceedings under the judgment, except as to the taxation and payment of the costs, might be stayed until after the appeal should have been decided; and that all proceedings under such judgment to obtain payment of the costs might be stayed until after the decision of the appeal, unless the solicitors of the parties to whom costs were made payable should give their personal undertaking to refund in case the judgment should be reversed.

The Plaintiff filed an affidavit by one of his solicitors, stating that the costs amounted to between £4000 and £5000, that the *National Bolivian Navigation Company* was a company incorporated and domiciled in the *United States of America*, that neither that company nor the *Maderia and Mamoré Railway Company* had any property which could be made available for the payment of the Plaintiff's costs, and that the Defendant *L. Nash* had no means to pay the same costs, and was merely a nominal party to the action whose costs were guaranteed by the two companies.

Benjamin, Q.C., and *Rigby*, in support of the application:—

The appeal in this case is a matter of right, no leave of the Court being necessary; and in such a case the practice of the Court has always been to order a stay of execution of a judgment pending the appeal if the Appellant would be irremediably injured by carrying it into execution, in case his appeal should succeed. When the appeal is a matter of right the Court will always so deal with the subject-matter of the appeal as not to render the appeal, if successful, nugatory. In the present case the whole of the fund is in the power of the Court, and cannot be distributed without the Court's permission. The judgment appealed from directs the entire distribution of the funds; the bonds are payable to bearer; it is known that from 900 to 1000 persons are interested in the fund; many of the bonds are held by persons on the Continent of *Europe* and others by persons in *South America.* If the fund is now distributed it can never be recovered. On the other hand the Plaintiff and the other bondholders cannot be injured by a stay of execution, for the fund is perfectly secure and is paying interest at £4 per cent.

[JAMES, L.J.:—What pecuniary interest have the two companies, *quâ* companies, in the fund? If the money is laid out in making the railway, as the companies wish it to be, the undertaking will be charged with the whole amount of the debt and a very large arrear of interest.]

We believe that, after paying the bondholders, the undertaking will be a valuable property. We believe that the enterprise is practicable both physically and financially. We are willing to expedite the appeal to the House of Lords as much as possible.

Southgate, Q.C., and *Cozens-Hardy*, for the Plaintiff:—

This is an exceptional case. Our affidavit shews that both the companies and also *Nash* are practically insolvent. The appeal is merely speculative; if it succeeds the Defendants will get no real benefit from the money, which will be all wasted. Each bondholder, on receiving his money, can give an undertaking to repay it if the appeal succeeds, and the difficulty in recovering it would not be great.

If the application to stay proceedings is granted, we ask the Court that it may be upon condition of the Defendants giving us a material guarantee for the amount of the costs in the Court below by paying into Court £5000, or some other sufficient sum;

for it would be useless to take out execution against either of the companies or against *Nash: Morgan* v. *Elford* (1).

[COTTON, L.J.:—Is there any precedent for the Court making any such condition?]

In the *Citizens' Bank of Louisiana* v. *Bank of New Orleans* (2) the appellants asked that the payment of a sum of £5000, which by the decree of the Master of the Rolls had been ordered to be paid to the respondents, might be stayed; and the Court ordered that the money should be paid into Court to abide the result of the appeal to the House of Lords "upon the Appellants giving security to be answerable as this Court shall direct for any loss that may be occasioned to the Respondents by reason of the order." The principle of that case applies to the present. But if there were no precedent the Court has power to make one in a case like the present, as was said by Lord Justice *James* in *Corporation of Hastings* v. *Ivall* (3).

Macnaghten, and *Snagge,* for the trustees.

Benjamin, in reply.

COTTON, L.J.:—

This is an application to stay the execution of an order for payment of a very large sum of money to the bondholders who are interested in it, on the ground that there is an appeal presented by the Defendants, the unsuccessful parties, to the House of Lords. There is also a direction in the order for payment of the costs out of the fund, and also a right given to the Plaintiff to get his costs from the Defendants. Now, as regards the direction for the payment of the costs out of the fund and the direction for payment of the costs by the Defendants, it would be contrary to the usual practice to stay any direction for the payment of costs, and therefore, in my opinion, there ought to be no interference whatever with the direction for payment of the costs out of the fund, and no interference with the right of the Plaintiff to get such costs as he can from the Defendants by putting the order into execution.

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(1) 4 Ch. D. 352.

(2) Law Rep. 6 H. L. 352; not reported on this point.

(3) Law Rep. 9 Ch. 758.

Of course the Plaintiff's solicitors will give, as is usual, an undertaking to refund the costs if the House of Lords should reverse the decree which has been made by this Court.

But then there comes the question whether or no that part of the order which directs payment to the bondholders should be stayed. I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory; and, acting on that principle, when there was an appeal to this Court from the judgment of Mr. Justice *Fry* dismissing the Plaintiff's action altogether, and it was urged therefore that this Court had no jurisdiction to stay the execution of the order, we were of opinion that we ought to stay the execution of a judgment in another action made by Mr. Justice *Fry*, ordering the fund to be dealt with—that is to say, by granting an injunction against the trustees to restrain them from parting with any portion of the fund in their hands till the appeal was disposed of (1). That possibly was rather novel, but it was right, in my opinion, to make that order to prevent the appeal, if successful, from being nugatory. Acting on the same principle, I am of opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory. I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit; they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund.

If there had been any case made by the Plaintiff that this appeal was not *bonâ fide*, that it was for some indirect purpose and not for the purpose of trying whether the judgment of this Court was right, the case would have stood in a different position, but there is no affidavit or tangible fact upon which, in my opinion, we can rely for the purpose of arriving at the conclusion that

(1) *Wilson* v. *Church*, 11 Ch. D. 576.

such is the fact. I deal with it as being presented in the right of the Defendants, and *bonâ fide* presented for the purpose of trying this question whether the judgment of this Court is or is not right. But then, of course, in staying the payment out of this money, we must put the Appellants on terms that they shall have the question, so far as in them lies, decided at the earliest possible opportunity by the House of Lords, and they must pay the costs of this application.

Brett, L.J. :—

This is an application to the discretion of the Court, but I think that Mr. *Benjamin* has laid down the proper rule of conduct for the exercise of the judicial discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory. That being the general rule, the next question is whether, if this fund were paid out, the appeal, if successful, would be nugatory. Now it seems to me that, looking at this matter in the view of men of business, one cannot help seeing that if this fund is paid out it is impossible to say to whom it will be paid. It is quite true that the payments out will be to persons many of whom will never be able to be found; it is very possible, and most likely, that several of them will be abroad; it is most likely that several of them will be in *America;* and the practical result of paying this money out to the different bondholders, or to the persons who would be holding the bonds at the time, would be that the fund never could be got back again if the appeal were successful. Therefore, if this case is to be dealt with according to the general rule, it seems to me that the Court ought to stay the payment out of this fund. That rule must be acted upon unless this is an exceptional case. It is suggested this is an exceptional case, because the Appellants are subject to a good deal of suspicion and open to a good deal of observation; but, whatever may be the ground of suspicion, or however right the observations may be, I cannot think that we ought on that ground to prevent them from having the usual protection in case their appeal is successful. With regard to the question of costs, even if there had not been the order, which it seems exists, that these costs should be paid out of the fund, I am of opinion that we ought not to deal with the costs. The Plaintiff is a litigant and must stand by the fate of all other litigants. He has an execution for costs. He says that he cannot make that execution effectual, but that would be so whether this application were granted or not. But, however, he seems to me to be amply protected, at all events on the present occasion, for his solicitor can get the payment of the money out of the present investment, and he may expend it if he thinks proper, and upon an unsuccessful appeal he will have other funds to pay it back, if not, he will amuse himself by putting the money from one investment into another—the fate of all other plaintiffs and respondents upon appeal. I do not see anything in this case to alter the ordinary rule of conduct; therefore I think this application must be acceded to.

James, L.J. :—

I am unable to agree with the conclusions at which the majority of the Court has arrived. I think this is a very exceptional case, and that it should be dealt with with reference to those exceptional circumstances. It is not a question of who is entitled to the money. If it were a question as to whether the Plaintiff or the Defendants were entitled to the money I should fully concur with what has been said by my colleagues, but, as I understand the case, the money was lent by the bondholders to the Bolivian Government for the purpose of being laid out upon a work, and the question is whether it is to be laid out upon that work when made, being a work for the benefit of the bondholders and the Bolivian Government; the only possible interest (which it appears to me is such a shadowy interest, I cannot pay the slightest attention to it) that the companies can have in the matter being the possible interest which the contractors may have in laying out the money in these works, and in the value of the works after they have been made. That interest appears to me, as a man of business, to be utterly idle and nonsensical. That is to say, *A.* has agreed to lend money to be laid out on property in which *B.* has an interest, but which when laid out will simply be a security for the man whose money is to be laid out. It appears to me that that does make an exceptional circumstance, and therefore, although it is not a matter of very great consequence, I cannot myself agree that this is a case which ought to be decided upon the general principle which is applicable to a case where the question is between two persons claiming a fund.

Solicitors: *Wilson, Bristows, & Carpmael ; W. W Wynne.*

CORPORATION OF BRISTOL *v.* WESTCOTT.

[1878 B. 549.]

C. A.
1879
V.-C. B.
May 28.
C. A.
July 9.

Lease—Covenant against parting with Possession—Partners.

A lease was granted to two partners, *B.* and *H.*, as joint tenants. The lessees covenanted that they, their executors, administrators, or assigns, or any or either of them, would not, during the term, assign, underlet, or part with the possession of the demised property to any person or persons without the written consent of the lessor; and there was a proviso for re-entry on the breach of any of the covenants. The partners dissolved partnership, and agreed that the partnership property should be made over to *B.*, and that the leasehold property should be assigned to him with the consent of the lessor, if such consent could be obtained, and recited, as the fact was, that *A.* had given up sole possession of the leaseholds to *B.* Consent was not obtained, and no assignment of the leasehold was executed, but *B.*, from the time of the dissolution, remained in sole possession :—

Held (affirming the decision of *Bacon*, V.C.), that there had been no breach of the covenant, and that the proviso for re-entry had not come into operation.

Varley v. *Coppard* (1) considered.

THIS was an action by the Corporation of *Bristol* for the purpose of ascertaining the rights of the Defendants in the purchase-money of certain property taken by the corporation under statutory powers, for the purpose of street improvements.

On the 20th of June, 1870, *Jane Hicks Westcott* demised to *Charles Baker* and *Robert Houghton,* described in the lease as "ironmongers and ironfounders and co-partners," the property in question, to hold the same "unto the said *C. Baker* and *R. Houghton,* their executors, administrators, and assigns," for twenty-one years from the 25th of March, 1870. By the lease *Baker* and *Houghton*, for themselves, their heirs, executors, administrators, and assigns, and each of them for himself, his heirs, executors, administrators, and assigns, covenanted with the lessor, her heirs and assigns, *inter alia*, "that they the said *C. Baker* and *R. Houghton*, their executors, administrators, or assigns, or any or either of them, will not during the said term assign, underlet, or part with the possession of the said hereby demised premises or any part thereof to any person or persons without the written consent of the said *J. H. Westcott*, her heirs or assigns." The lease contained a proviso that if (*inter alia*) "the said *C. Baker* and *R. Houghton*, their executors, administrators, or permitted assigns, or any or either of them, shall not in all things well and truly observe, perform, and keep all and every the covenants and agreements on their and his part hereinbefore contained, that then and in any or either of such cases it shall be lawful for the said *J. H. Westcott*, her heirs or assigns, or either of them, into and upon the said premises hereby demised, with all additions and improvements thereon, or into or upon any part or parts thereof in the name of the whole, to re-enter, and the same and every part thereof to have again, re-possess, and re-enjoy, as in her or their first or former estate or estates."

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(1) Law Rep. 7 C. P. 505.

On the 12th of June, 1872, *Baker* and *Houghton* agreed by a memorandum in writing to dissolve partnership, and signed another memorandum of the same date, by which it was agreed "that for the purpose of perfecting the said memorandum of agreement a proper deed of dissolution of the said partnership in duplicate shall be prepared, which deed shall contain an assignment by the said *R. Houghton* to the said *C. Baker* of all his estate and interest in the partnership property and effects, and of all indentures of apprenticeship, and the benefit of all agreements entered into by the said partners with any person or persons whomsoever, and either by the same or a separate deed of all his estate and interest in any leasehold premises in which the said partnership business is now carried on, with the consent of the lessor of the said premises, if such consent can be obtained." *Houghton* also signed a third memorandum reciting that he had given sole possession of the leasehold premises to *Baker*.

The partnership was accordingly dissolved, and *Baker* remained in sole possession of the leasehold property in question, but *Houghton* did not execute any assignment of his interest therein to *Baker*. Miss *Westcott's* consent was not applied for.

On the 7th of April, 1877, Miss *Westcott* commenced an action against *Baker* to recover possession of the demised premises, on the ground that *Houghton* and *Baker*, or one of them, had "assigned, underlet, or parted with the possession of the premises by the said lease demised to some person or persons, without the written consent of the Plaintiff."

About the end of March, 1878, the corporation, under their statutory powers, took possession of the demised property, and pulled down the buildings. Miss *Westcott* thereupon discontinued her action against *Baker*.

Shortly after this the amount of compensation payable to Miss *Westcott* came on to be assessed by a jury. Her counsel insisted on her right to have the value of the fee simple assessed as free from the lease, and on the 9th of July, 1878, the jury found on that footing that the value was £1500.

On the 4th of October, 1878, the value of *Baker's* leasehold interest was fixed by arbitration at £345, and £1992 was awarded to him for loss of trade and other compensation apart from his leasehold interest (if any) in the premises.

The corporation thereupon commenced this action against Miss *Westcott* and *Baker*, to have the rights of the Defendants in respect of the premises and in the purchase-money ascertained and declared by the Court.

By an order dated the 14th of February, 1879, it was ordered that the following issues between the co-Defendants should be tried:—

1. Whether the lease of the 25th of June, 1879, became forfeited previous to the 7th of April, 1877 (the day of the issue of the writ in ejectment), by reason of a breach by the lessees, or either of them, of the covenants therein on the part of the lessees contained not to assign, or underlet, or part with the possession of the demised premises.

2. If the above question be decided in the affirmative, then whether the right of forfeiture or re-entry was waived.

The issues were tried before Vice-Chancellor *Bacon* on the 28th of May, 1879.

Sir *H. Jackson*, Q.C., and *E. S. Ford*, having opened the case for the Plaintiffs, it was arranged that the first issue between the co-Defendants should be first tried.

Horton Smith, Q.C., and *Maidlow*, for Miss *Westcott*:—

We say that giving up sole possession of the property to *Baker* was a breach of the covenant: *Varley* v. *Coppard* (1); *Finch* v. *Underwood* (2).

Hemming, Q.C., and *Charles J. R. Poole*, for *Baker*:—

No assignment has been executed, so the case is not within *Varley* v. *Coppard*. One joint tenant has a right to say to the other, "I will no longer exercise my right of entering on the property;" that is not what is struck at by the covenant, which aims at preventing either of the tenants from giving to a person to whom the lessor has not given it an interest in or possession of the property. Here *Baker*, as joint tenant, was in possession of the whole before the dissolution. Abandoning possession is not parting with possession to any person. There has therefore been no breach of the covenant.

BACON, V.C.:—

The covenant must have a rational construction put upon it. This is a lease granted by the owner of a warehouse to two gentlemen who were partners. They agreed not to part with the possession to any person, and as each partner has full possession of the whole of the demised property, it cannot mean that, in case Mr. *Houghton* might be smitten down by apoplexy so as not to be able actually to enter the premises, the lease should be forfeited. It cannot mean that if his commercial engagements should require his attendance in any other country he should not go away and leave his partner in sole actual possession. No such doctrine as that is laid down in *Varley* v. *Coppard*.

So far from there being an assignment in this case the partners stipulated in their agreements that *Houghton* should not assign unless he could get the assent of Miss *Westcott*. Nothing can be plainer than the contract between the two partners. There has been no breach of the covenant not to assign. There has been no parting with the possession. For one partner to withdraw does not alter the legal rights of the lessor. The remaining partner was from the first in full possession, and he only continues so.

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(1) Law Rep. 7 C. P. 505.

(2) 2 Ch. D. 310.

A decree was made directing conveyances on the footing of the lease being subsisting.

Miss *Westcott* moved by way of appeal for a new trial of the first issue, and a trial of the second issue. The appeal was heard on the 9th of July.

Horton Smith, Q.C., and *Maidlow*, for the Appellant:—

We contend that the case is within *Varley* v. *Coppard* (1), which decides that an assignment to one partner on a dissolution is a breach.

[JESSEL, M.R.:—In that case the outgoing partner purported to assign, so the case does not go far enough for your purpose. I do not know that I should have decided even that case in the same way, for the deed was not in point of law an assignment but a release. But you have to rely on the words "part with the possession," and how can possession be parted with to a person who already has it?]

In *Finch* v. *Underwood* (2) that decision appears to have been approved. The exclusive possession of the partner who remains in possession is something quite different from what he had before, and on fair construction there is a parting with possession to him.

Hemming, Q.C., and *Poole*, for *Baker*, were not called upon.

JESSEL, M.R.:—

In my opinion we must in the first place construe the covenant without regard to the proviso for re-entry, for its construction must be the same in an action for damages for breach of the covenant as in an action for the recovery of the land on the ground that the proviso for re-entry has come into operation by reason of such breach.

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(1) Law Rep. 7 C. P. 505.

(2) 2 Ch. D. 310.

Covenants of this description in leases are seldom artistically drawn, and rarely provide for all the events that may reasonably be expected to occur. They very often are meaningless, but often, having regard to the nature of the property leased, we can construe them so as probably to effectuate the intention of the parties.

In the present case there is a lease to *Baker* and *Houghton*, and there is a covenant "that they the said *C. Baker* and *R. Houghton*, their executors, administrators, or assigns, or any or either of them, will not during the said term assign, underlet, or part with the possession of the said hereby demised premises, or any part thereof, to any person or persons without the written consent of the said *J. H. Westcott*, her heirs or assigns." In reading those words we must recollect that two people do not usually have the same executors or administrators, and therefore "their executors and administrators" cannot mean the executors and administrators of both, nor can the words mean "their respective executors and administrators," because one would most likely die before the other, and we are not to assume that the parties contemplated such an improbable event as that of the lessees dying at the same moment. The words, therefore, must mean the executors or administrators of the survivor. I only say this to shew that it is impossible to deal with these covenants literally. If you take this covenant to the letter, a forfeiture would be caused by an assignment by the executors of the lessee who died first. Of course, the clause cannot have that meaning, for it must refer to assignment by a man who has something to assign.

Now we come to deal with the words "part with the possession of the demised premises to any person or persons." What do the words "any person or persons" mean? Do they not mean "any other person or persons"? Of course, if the demise had been to one person the words must have had that meaning, and the question is whether, where the demise is to several persons, the words have not the same meaning—whether, in fact, what was intended was not this, that the lessees were not to let into possession any one not previously approved of as tenant by the lessor.

C. A.
1879
CORPORATION OF BRISTOL v. WESTCOTT.

Giving the words that meaning, you make the covenant sensible, and I think that is their fair meaning. Upon that construction what has occurred is not a breach of the covenant, and consequently I think that the decision of the Vice-Chancellor is correct.

BRETT, L.J.:—

I will not give any opinion upon the question whether an assignment by one of the two lessees to the other would have been a breach of the covenant, for there has not been any such assignment, and the question before us turns only upon the words relating to parting with the possession of the demised property to any person. It seems to me upon the construction of this covenant that parting with possession to any person means to any person other than one of those two to whom possession was given by the original lease.

COTTON, L.J.:—

I am of the same opinion. I agree that, although it is a question of forfeiture, we must construe the covenant fairly, ascertain its meaning without regard to forfeiture, and then see whether, upon that ascertained meaning, a forfeiture has been incurred. But when we look at the words of this covenant with regard to the circumstances of the case when it was entered into, I think its proper construction is that the lessees are not to give possession to any one who has not already been admitted as tenant, or approved as a tenant by the lessor.

Solicitors: *Warry & Co.; Jones, Blaxland, & Son; Brighten, Parker, & Norman.*

C. A.

1879

M. R.

April 23.

C. A.

July 16.

ELWES *v.* PAYNE.

[1879 E. 44.]

Market—Weekly Sale by Auction on different Day—Interlocutory Injunction—Balance of Convenience.

The Plaintiffs were owners of the tolls of an ancient cattle market held weekly on Thursday. The Defendants, who were auctioneers, fitted up with stalls and pens a neighbouring piece of ground, and issued circulars stating that weekly sales of cattle by auction would be held there on Mondays. The Plaintiffs brought their action to restrain the Defendants from holding their proposed sales as being an interference with the Plaintiffs' market:—

Held, by the Master of the Rolls, that, having regard to modern facilities for traffic, a market on Monday was *primâ facie* an injury to a market on Thursday, that what the Defendants were doing was in fact the establishment of a rival market, and that an interlocutory injunction ought to be granted.

Held, on appeal, that, the Defendants' undertaking to keep an account, an interlocutory injunction ought not to be granted, for that, if an injunction was granted and it turned out that the Defendants were in the right, there would be great difficulty in ascertaining the compensation to which they would be entitled, whereas, if an injunction was refused, and the Plaintiffs succeeded at the trial, there would be no difficulty in giving them compensation, and their market would suffer no permanent injury from the sales by the Defendants in the meantime.

THIS was an action to restrain the Defendants from holding sales by auction or otherwise of cattle, sheep, horses, pigs, or any other stock, wares, or merchandise upon a piece of land in the parish of *Bigby*, near the *Brigg* station of the *Manchester, Sheffield, and Lincolnshire Railway*, and from doing any other acts whereby the Plaintiffs might be deprived of the benefit of the tolls and franchises theretofore and then enjoyed by them as owners of the tolls of fairs and markets in *Brigg*.

The Plaintiff, Mr. *Elwes*, was tenant for life in possession of settled estates in the county of *Lincoln*, including the tolls of an ancient market at *Brigg*. The trustees of the settlement and the lessee of the tolls were co-Plaintiffs. The title of the Plaintiffs was evidenced by a charter of the 20th year of the reign of King *Henry* III., which confirmed to *Ervisius de Neville* and his heirs for ever the right to hold one market in every week, on Thursday, at the *Bridge of Glamford*, and also the right of holding a fair, which did not come in question on the present occasion.

The market had for a long series of years been held upon two pieces of ground near *Glamford Bridge*, one of which was used for the sale of cattle, sheep, pigs, and horses and the other for the sale of various goods, and the Plaintiffs and their predecessors in title had received tolls in respect of the cattle and goods exposed for sale.

The Defendants were auctioneers carrying on business at *East Retford*, and became tenants to the *Manchester, Sheffield, and Lincolnshire Railway Company* of a piece of land adjoining the *Brigg* station of that company, rather larger than the piece of ground on which the Plaintiffs' cattle market was held, and situate at a distance of about 665 yards from it. They proceeded to fit it up with stalls and cattle-pens for the purpose of holding there periodical sales by auction of cattle, sheep, and pigs, and issued circulars stating that weekly sales by auction would be held there on Mondays.

The Plaintiffs thereupon, after some correspondence, commenced this action, considering that the Defendants were setting up a rival market which would prejudicially affect that of the Plaintiffs.

The Plaintiffs moved for an interlocutory injunction according to the terms of the writ. The motion was heard before the Master of the Rolls on the 23rd of April, 1879.

Bristowe, Q.C., and *S. Dickinson*, in support of the motion:—

The Plaintiffs, who are owners of this market under a grant made in the time of *Henry* III., if not earlier, by virtue of their title and of their having exercised their right without interruption to the present time, are now entitled to come to the Court to restrain the Defendants from opening their proposed sales, although they are to be held on a different day in the week.

In the case of *Yard* v. *Ford* (1) it was held that if a new market be erected without patent in a town near to an ancient market, it may be a nuisance though holden on a different day.

The sales by auction which are intended to be held by the

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(1) 2 Wms. Saund. 6th Ed. p. 172; 1 Lev. 296; Sir T. Raym. 195; 7 Mod. 69; 1 Vent. 98; 2 Keb. 689, 706.

Defendants is virtually a market, and being a clear infringement of the Plaintiffs' rights, should be restrained by injunction.

Jason Smith, for the Defendants:—

The case of *Yard* v. *Ford* (1) is not an authority in the Plaintiffs' favour, for there the original market was held on Wednesday, and the one complained of was on Tuesday. In the present case the Plaintiffs' market is on Thursday, and the Defendants' sale is to take place on a Monday.

But even if the days were not too far apart, the announcement which the Defendants have made is simply of sales by auction, and is not the holding of a market. In the case of *Mayor of Macclesfield* v. *Chapman* (2) it was held that the grant of a market does not of itself imply a right in the grantee to prevent persons from selling marketable articles in their private shops within the limits of the franchise on market days, and the same principle would apply to an auction on the Defendants' land. The case of *Mayor of Penryn* v. *Best* (3) was a decision to the same effect.

The question of the sale of sheep and cattle within the *Agricultural Hall* was considered in *Fearon* v. *Mitchell* (4), but that case related to the *Markets and Fairs Clauses Act*, 1847, and as to whether an auctioneer's premises were a shop within the meaning of sect. 13 of that Act.

In *Lee* v. *Bayes* (5) it was held that a sale by public auction at a horse repository out of the city of *London* was not a sale in market overt.

Even if your Lordship should be against me, I submit that this is not a case for an injunction on an interlocutory application, but that the Defendants should keep an account until the hearing.

Bristowe, in reply.

JESSEL, M.R.:—

The questions which have been argued to-day are, I am free to confess, novel to me.

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(1) 2 Wms. Saund. 172.

(2) 12 M. & W. 18.

(3) 3 Ex. D. 292.

(4) Law Rep. 7 Q. B. 690.

(5) 18 C. B. 599.

The Plaintiffs are the owners of a very ancient market granted in the time of *Henry* III., and probably existing some time before that. It seems to have been enjoyed without interruption down to the present time. The evidence is, so far, all one way.

As regards the market now proposed to be interfered with, it is a market for horses, cattle, and sheep. The Defendants have obtained upon lease a piece of land which, as far as the evidence before me enables me to form an opinion, is rather larger than, what I will call for convenience sake, the cattle market of the Plaintiffs. They have erected upon this piece of land stalls and pens for cattle and sheep, sufficient to accommodate a very large number of animals; and they are about to hold what they call "sales by auction" on every Thursday of those animals. They have issued circulars inviting people who have cattle, sheep, and other animals to sell to send them there for sale, and they have also invited the public to come in and buy them.

The Plaintiffs' market is held on Thursdays. The proposal of the Defendants is to hold their sales on Mondays.

Three questions arise for decision. The first is whether in law the sale in another market on a Monday can be a nuisance, or an actionable injury, so far as regards the market or the owner of the market which is held on the Thursday. The second question is whether, assuming the holding of a market on a Monday would be restrainable by injunction or the subject of an action, that which the Defendants propose doing is fairly to be described as the holding of a market. The third question is whether, even assuming that the present opinion of the Court is against the Defendants upon both points, an injunction ought to be granted, or whether, upon the Defendants undertaking to keep an account, no order should be made on the motion.

As regards the first point, I think it is settled by authority, and especially by the case of *Yard* v. *Ford* (1), of which there are several reports, probably the best, upon the whole, being that in *Saunders*, who argued the case, though the judgments, more especially that of Mr. Justice *Twisden*, are better reported in two of the other reports, that, in accordance with the opinion of *Blackstone*, it may be a nuisance to hold a market on a different day, and even several days off the day on which the first market is held.

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(1) 2 Wms. Saund. 172.

The law appears to be, that if the second market is held on the same day as the first market—that is, the first in date of grant—it is to be presumed to be a nuisance without further proof; that is to say, the law presumes it to be an actionable injury to the first market; but if the other market is held on a different day, then you must prove the injury and shew the actual damage before you can stop the holding of the second market. That, of course, is a question of fact to be proved before a jury if the case is tried before a jury, or before the Court alone if the case is tried before the Court alone, without any other question. That appears to be the result of the authorities. It appears to me, upon principle, that that ought to be the law, because whatever interferes with the franchise in such a way as to deprive the owner of the benefit of the franchise ought in principle to be treated as a nuisance. This, however, must be confined within reasonable limits, because otherwise every sale in a county might possibly prevent a sale at some particular market.

It is a very singular thing that as far back as the reign of *Henry* IV., and I have sent for the Year Book to verify it, a discussion arose as to whether a market held on a Tuesday was a nuisance to a market held on Saturday. There is not much distinction that I can see as to time between a Tuesday and a Saturday, and a Monday and a Thursday; at all events, not a difference to the advantage of the Defendants. In fact there is an interval of three days, taking it in one way, and in the other way there is only one of two days. The Judges, after consideration (one of them having actually changed his opinion, as it appears from the report, in the meantime), held that it was not a case to be decided on demurrer, but that an issue must be directed to be tried by a jury whether or not there was actual damage caused. That was cited by *Saunders*, C.J., when at the Bar, in the case of *Yard* v. *Ford* (1), as expressly in point, and the Judges acted on it, and there, after verdict found, maintained the judgment.

In this case, the evidence at present cannot be considered very conclusive either way, but looking at what the Defendants are about to do, and considering the modern facilities for traffic, I must say that what is really a mere matter of opinion rather than positive evidence is entitled to great weight. I think it is not only possible, but very probable indeed, that a market held on Monday would damage a market held on the succeeding Thursday, or *vice versâ*. Indeed, I think the result would be the same either way, and, unless my opinion upon this point should be changed by further evidence, I shall be prepared so to hold, and consequently I look upon this part of the case as a *primâ facie* case made out on the part of the Plaintiffs. Of course there might be evidence adduced at the trial to shew that no such injury would accrue. I am only giving an opinion as to what is made out by the present affirmative evidence. That being so, and being of opinion that a market on this day would be of very serious injury to the Plaintiffs' market, I come now to consider the question of what the Defendants propose to do.

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(1) 2 Wms. Saund. 172.

Now, it does not appear to me to be fairly open to discussion that what the Defendants propose to do is to establish a rival market. I think it is a rival market. I do not think that any possible definition of the word "market" would exclude what the Defendants are doing. They are inviting the public to send their cattle, their horses, and their sheep, and other animals for sale to this place which they have built as a place of sale for cattle and horses. They invite people to come in and buy the cattle. It makes no difference, in my opinion, whether there is a sole seller, or a sole stall-keeper. In fact, in many ancient markets you could only sell before the clerk of the market or other officer of that kind. It was necessary to do that in order to make a valid sale at all, and therefore the mere fact that all the sales are to take place before one individual does not appear to me to make any difference.

I am not going through the authorities which have been cited on the present occasion, but I will read one passage from the judgment of *Blackburn*, J., in *Fearon* v. *Mitchell* (1), upon this point; because it is entirely independent of the question decided by the Court, namely, the question whether what the Defendant had erected was or was not a shop. *Blackburn*, J., says: "What are the facts here? There is an enclosed yard in which 1400 sheep

(1) Law Rep. 7 Q. B. 690, 697.

and 100 head of cattle can be exposed for sale at one time." Now, as far as I can judge from the relative sizes of the two spaces, the Defendants might sell the same number as in the case to which I am referring. Then his Lordship goes on to say: "The Respondent advertises and holds sales of cattle and sheep every Monday, selling thousands—the number exceeding those sold in the market, the cattle and sheep being the property of farmers and others who send them there for sale from all parts of the county." That exactly applies to this case. "This appears to me to be—I will not say a setting-up of a rival market, for the Respondent had started it first—but a keeping up of a market in rivalry and to the disturbance of the market established by the local board as authorized by the Statute." Therefore I have the distinct opinion of *Blackburn*, J., that, an auctioneer, as this gentleman was, doing the very thing which these Defendants propose to do, was keeping up a rival market. He then goes on to say this: "I do not pretend to give a very precise definition of where 'shop' ends, and where 'market' begins; but I cannot doubt that the Respondent has been keeping up a disturbing market."

Sheltering myself behind that high authority, I cannot doubt that what the Defendants propose to establish is a disturbing market, and, therefore, on that point I am against the Defendants also.

The third point is, what ought I to do? One must consider in cases of injunction, especially of interlocutory injunctions, where the Court may afterwards see reason for coming to an opposite conclusion at the trial of the action, what is the mischief which the Defendants propose to do? The Defendants have not begun their trade; they may have laid out some money in building or erecting these pens, but that is a trifling matter. It will, therefore, as far as they are concerned only come to this that, the Plaintiffs being able and no doubt willing to give a good undertaking in damages, the Defendants will be merely at the loss of so much time in beginning their trade, if they should be ever allowed to begin it, which is a subject of compensation, and which can be readily ascertained if necessary. On the other hand, if I do not restrain the Defendants, and they establish a rival market, they may do considerable injury to the Plaintiffs; that is to say, they may draw away customers from the Plaintiffs' market, and they may never go there again, even although I may eventually stop the carrying on of the market of the Defendants. It would be very difficult then to ascertain the amount of damage sustained by the Plaintiffs.

Looking, therefore, to the result, in fact to the balance of convenience and inconvenience, I think the right course will be to grant the injunction, taking from the Plaintiffs, of course, the usual undertaking in damages.

C. A.

The Defendants appealed. The appeal was heard on the 16th of July.

Davey, Q.C., and *Jason Smith*, for the Appellants:—

It is by no means certain that the sales on Monday will hurt the market on Thursday. The result of what the Defendants are doing may be to make *Brigg* a centre of the cattle trade, and increase the custom of the market. There is no reported case in which an injunction to restrain the use of a market has been granted. In *Anon.* (1) such an injunction was refused till the right had been established at law, with an expression of doubt whether an injunction could even then be granted. It is now not necessary for a trial in another Court to take place to establish the right, but the right must be established, and that can only be done at the trial. A market beyond the third part of twenty miles from the old one is not a nuisance to the old market: *Bracton*, lib. iv. c. 46, § 100; *Fleta*, iv. §§ 13, 14. A market held on the same day with the old one is a nuisance to it: *Yard* v. *Ford* (2), but if held on any other day it is not presumed to be a nuisance, though it may be proved to be so: *Blackstone's* Commentaries (3). *Fearon* v. *Mitchell* (4) was quite a different case, as it turned on the *Markets and Fairs Clauses Act*, 1847. The case is not one proper for an injunction before trial.

[They were then stopped by the Court.]

Bristowe, Q.C., and *S. Dickinson*, *contrà*:—

The Plaintiffs have a clear proprietary right, and there is

(1) 2 Ves. Sen. 414.

(2) 2 Wms. Saund. 172.

(3) Pages 111, 218.

(4) Law Rep. 7 Q. B. 690.

enough to enable the Court to draw the conclusion that the proceedings of the Defendants will injure it: *Mayor, &c., of Dorchester* v. *Ensor* (1). Matters ought therefore to be kept in *statu quo* till the trial. The carrying on a rival market even for a time will be a permanent injury to the Plaintiffs' franchise, and as the Plaintiffs are in possession it is not even necessary to shew irremediable injury. The Defendants have not opened their place of business, and so cannot be seriously hurt by an injunction.

JAMES, L.J.:—

I do not intend to express any opinion that the Plaintiffs will not succeed at the hearing of the action in establishing their franchise, which does not seem to be seriously in dispute, and in establishing that what the Defendants propose to do will be a nuisance to that franchise; but this is the first time that I have ever heard of an interlocutory injunction being granted in respect of such a right as this. The only question that it seems to me right to decide at the present moment is whether there has been such a case made out as to induce the Court before the rights are finally determined to do something which shall interfere with the *primâ facie* rights of the Defendants. By the law of *England* every one who has a close near a railway station has *primâ facie* a right to have sheep and beasts, and to sell those sheep and beasts on that close. Every one has a right to carry on the trade of an auctioneer if he pleases, and in carrying on that trade of an auctioneer he would have also a perfect right to sell sheep and animals on that close in the same way as a man has a right to erect a furnace on his own land if he does not interfere with his neighbours' rights. It may be that in selling the sheep and beasts he will be doing something which amounts to an invasion of another man's legal monopoly or franchise. The question to be determined at the hearing is whether what the Defendants are doing amounts in point of law to such an invasion. In the meantime, as we are not in a position to determine the matter, what is the best thing to be done with a view to keeping things in such a state as to do the least injury to the person who turns out eventually to be right? The order of the Master of the Rolls is not in accordance with my view of what ought to be done, having regard to the greater amount or less amount of damage to be sustained by these parties. If the Defendants are stopped from beginning a trade which may become a very valuable trade, then, supposing they should turn out to be right, they will have been prevented from carrying on a trade which they had a perfect right to carry on, and there would be great difficulty in determining the amount of damage they would have sustained. I do not know how they would be compensated if it should turn out that they are right. On the other hand, if the Plaintiffs succeed at the trial, it does not seem to me that there will be the slightest difficulty in giving them full compensation for everything that they can shew they have lost. I really cannot follow the argument which has been addressed to us, or some of the expressions used by the Master of the Rolls in his judgment to the effect that the temporary withdrawal of some traffic from the Plaintiffs' weekly market to the Defendants' place of sale until the hearing of the cause may have an appreciable effect on the permanent character of the Plaintiffs' market. It does not strike me that merely because people have gone to the Defendants' field instead of going to the market of the Plaintiffs for a few weeks, they will have lost the habit of going to the market, and will go to some other market at some greater distance if and when the rival market of the Defendants is put an end to at the hearing of the action. I cannot myself come to that conclusion as a matter of fact, and, therefore, I am of opinion that the order of the Master of the Rolls ought to be discharged, the Defendants undertaking to keep an account of every head of cattle, calves, sheep, and other animals, in fact of every marketable animal that they receive for the purpose of being sold on thier piece of ground, and also undertaking to keep an account of all sums received for or in respect of the same, or of any stallage, whether on commission or otherwise.

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(1) Law Rep. 4 Ex. 335.

Brett, L.J.:—

I think it was admitted that unless the Master of the Rolls had been of opinion that the withdrawing of customers from the market between the time of granting this interim injunction and the hearing of the cause might probably result in withdrawing them from the market for ever, although the Defendants' place of business might eventually be closed, he would not have granted this injunction. Therefore, the only question we have to consider is whether we agree with the Master of the Rolls in that conclusion.

Now, with the greatest deference to the Master of the Rolls, I cannot agree in that. The analogy is put of withdrawing customers from a shop, and it is said that if you withdraw customers from a shop by setting up another shop in opposition, then, although the second shop is closed, customers do not always, and it is probable that many of them will not, go back to the former shop. I cannot think that that is a good analogy to a market. There generally are other shops which may be and probably are quite as convenient as the first shop, but if the Defendants' auction is closed there will be but this one market, and it seems to me a rather far-fetched and strained conclusion that because people for some weeks, or it may be months, have not gone to that market, they will, therefore, not go to it when it is the only neighbouring market, but will go to a distant market. I think, therefore, that the ground of the injunction is taken away.

COTTON, L.J.:—

The Master of the Rolls clearly considered that if this injunction was not granted irremediable damage might be done to the Plaintiff if he turned out to be in the right. I agree with my learned brethren that this is not the proper conclusion. If the so-called market of the Defendants had been held at a place at some little distance from *Brigg*, or even in communication with a line of railway not going to *Brigg*, there might be more difficulty on that point; but here is a so-called market set up at *Brigg*, the very place where the Plaintiff's market is held, and if the result of the Defendant's going on till the hearing selling by auction or upon commission is to bring to *Brigg* cattle which did not previously come there, it will possibly be an advantage to the Plaintiff by leading people who formerly did not come to *Brigg* to form the habit of coming there. The case is quite different from that of customers being lured away from an old shop. When they have once left the shop, then, although the second shop may be closed, they may think that there are other shops which may perhaps serve them better than the old shop to which they formerly went. If it had been suggested that there was a market held on Mondays at *Retford*, or some other neighbouring place, and that the opening of the Defendants' market might get the farmers into the habit of sending their cattle on the Sunday night, and so lead them to prefer a Monday market, there might be ground for contending that, though the Defendants' market were afterwards closed, it would have inflicted irremediable injury on the Plaintiffs, but no such state of things is suggested. It does not seem to me that there will be any irremediable damage or injury caused to the Plaintiffs by not granting the injunction, but there may be very great difficulty at the hearing in estimating the damage sustained by the Defendants if this injunction should be granted and it should turn out that the Plaintiffs had no right to interfere with the Defendants.

Then it is said that the Defendants have not at present opened their place of business. As I understand, they have prepared certain buildings and have issued an advertisement, and I should say that it might be a very great injury to a man in this business, who has advertised and gone to other expense, to be now stopped, and perhaps for a long time to be unable to receive the cattle of those customers whom by his advertisement he has invited to come there for the purpose of having their cattle sold. To deal with another matter urged before us, that it is not necessary in this case for the Plaintiffs, who are in possession, to shew that irremediable mischief is occasioned to them by the Defendants interfering with and disturbing their possession; if that really was the present case it would stand in a different position. I am ready to admit that in such a case irremediable mischief need not be shewn, but I think that there is a fallacy in the use of these words, "The Plaintiffs are in possession, and the Defendants are interfering with and disturbing their possession." The Plaintiffs are, no doubt, in possession of a franchise, but they are not in possession of anything with which the Defendants are directly or physically

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interfering. The question is whether or no what the Defendants are doing is an interference with the right of the Plaintiffs. That is the question to be tried at the hearing. Where the Plaintiffs are in possession and the Defendants are physically and directly interfering with that possession, the only question is whether the Defendants can justify those acts which are directly and physically interfering with the possession and the quiet enjoyment of the property as enjoyed by the Plaintiffs at the commencement of those acts of the Defendants. But where the interference is not physical or direct, but is indirect and only comes in the shape of the consequences which the acts of the Defendants may have upon the market, the case is very different. Therefore, upon the balance of convenience and inconvenience, in my opinion there should be no injunction.

The order of the Master of the Rolls was accordingly discharged, the Defendants undertaking to keep an account of all cattle, calves, sheep, horses, pigs, and other stock received by them for sale, and of all receipts by them for the stallage thereof and the sale thereof, or otherwise in respect thereof whether for commission or otherwise. Costs of the motion and of the appeal to be costs in the action.

Solicitors: *Tamplin, Taylor, & Joseph; W. F. Watson.*

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Ex parte GRIFFIN. *In re* ADAMS.

Bankruptcy Petition—Improper Motive—Collateral Object—Abuse of Process of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), ss. 6, 8.

14 Ch D 37
— 718
20 Ch D 685
192, 57

When the Court sees that a bankruptcy petition is presented, not with the *bonâ fide* view of obtaining an adjudication, but for a collateral purpose and with the view of putting pressure on the debtor, it will refuse to make an adjudication, even though there be a good petitioning creditor's debt, and an act of bankruptcy has been committed.

THIS was an appeal from the refusal of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, to make an adjudication of bankruptcy against *A. W. Adams.*

Set off agst costs pble under this decision
of costs pble in respect of proceedgs in Q B D

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The petitioning creditor was *John Griffin*, and he alleged that *Adams* was indebted to him in the sum of £1979 19*s*. 1*d*., which was made up of £1876 17*s*., the amount of a judgment recovered by *Margaret Edenborough* on the 30th of November, 1877, against *Adams*, in an action in the Queen's Bench Division on two bills of exchange, and interest and costs in respect thereof. On the 24th of April, 1878, Mrs. *Edenborough* assigned the judgment debt for value to one *C. J. Culley*, who was a clerk to *Griffin*. This assignment was really made to *Culley* as a trustee for *Griffin*, *Griffin* paying the purchase-money. On the 27th of May, 1878, *Culley* presented a bankruptcy petition against *Adams*, founded on the judgment debt, but the petition was dismissed, on the ground that *Culley* could not sustain it unless *Griffin*, as the beneficial owner of the debt, also joined in it (*vide Ex parte Culley* (1)).

On the 20th of September, 1878, *Culley* assigned the debt to *Griffin*, and he, on the 1st of October, 1878, served a debtor's summons on *Adams* in respect of it, upon which *Adams* committed an act of bankruptcy. On the 4th of March, 1879, *Griffin* presented a bankruptcy petition against *Adams* in respect of the debt. *Adams* resisted the petition, on the grounds that the consideration for the debt was illegal, and that the presentation of the petition and the institution of the whole of the proceedings in connection therewith was inequitable and an abuse of the process of the Court.

Griffin and *Adams* both held mortgages upon a property called "*The Cedars*," at *Leytonstone*, belonging to one *F. Moojen*, a solicitor. *Griffin* was the son-in-law of *Moojen*. *Griffin's* mortgage had been transferred to him by a Mr. *Perkins*, who, as to part of his debt, was the transferee of a Mr. *Ogilvie*, who held the first legal mortgage on the property. When *Perkins* took the transfer he made a further advance to *Moojen*. Before this *Moojen* had executed the mortgage to *Adams*, as a security for advances made by him, and he represented to *Perkins* that the only mortgage on the property was that to *Ogilvie*. *Griffin* afterwards acquired the equity of redemption of the property. In an action by *Perkins* to settle the priorities, the Master of the Rolls on the 5th of November, 1877, decided that *Perkins* was entitled to a first charge on the property for the whole of his debt. In consequence of this decision *Adams* applied to the Master of the Rolls to strike *Moojen* off the rolls of the Court, and on the 24th of May, 1878, the Master of the Rolls ordered him to be struck off.

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(1) 9 Ch. D. 307.

Upon the evidence on *Griffin's* petition the Registrar came to the conclusion that Mrs. *Edenborough's* debt "was acquired by *Griffin* simply and solely to enable him to enforce his personal purposes against the debtor by means of the intimidation of the Bankruptcy Court; the double purpose being to stifle the proceedings against *Moojen* and to stifle the claim of *Adams* upon *The Cedars,* the question between them (and *Griffin* assuredly contemplated no other interest than his own) wholly appertaining to another tribunal." His Honour accordingly held that he was bound to dismiss the petition "as being wholly outside the legitimate purposes of bankruptcy, as based upon proceedings altogether illegal, inequitable, vexatious, and oppressive." And on this ground he dismissed the petition with costs.

Griffin appealed.

Finlay Knight (Sir *H. Jackson,* Q.C., with him), for the Appellant:—

The Registrar has come to a wrong conclusion on the evidence. But, even if he is right, a creditor, on proving his debt and the commission of an act of bankruptcy, has a statutory right to an adjudication: *Bankruptcy Act,* 1869, ss. 6, 8.

Robinson, Q.C., and *Pollard,* for *Adams,* were not heard.

JAMES, L.J.:—

I think that this case is more shocking than that of *Ex parte King* (1), in which I said that it was quite shocking that proceedings in bankruptcy should be used as a means of extorting money from a debtor. To my mind the present is a far more shocking case. I think I never knew a case so transparent as to the fraud with which the whole thing was conceived, and the oppression which it was intended to exercise. It would, I think, be a shock-

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(1) 3 Ch. D. 461.

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ing thing for any Court of Justice in a civilized country to be made the instrument of proceedings like these.

Brett, L.J.:—

A more transparent fraud upon the bankruptcy law I do not think it is possible to imagine. A debt, which was apparently not worth a shilling, was bought up, not for the purpose of its being recovered, not for the purpose of making the debtor a bankrupt, but for the purpose of threatening to make him a bankrupt, in order to force him by that oppression to give up a just debt which was due to him, so that the estate on which it was charged might go cleared from the charge into the hands of *Griffin*, and also for the purpose of saving *Moojen*, who was *Griffin's* father-in-law, from a most proper and just application to strike him off the roll of solicitors. I am sorry to say I am not shocked at these proceedings, for I am too old to be shocked at anything, but certainly a viler fraud I have never heard of.

Cotton, L.J.:—

I agree that the appeal must be dismissed. The proceedings in bankruptcy were not taken to obtain payment of the debt, but the debt was purchased in order to take the proceedings in bankruptcy.

26 Ch D.

James, L.J.:—

After what Lord Justice *Cotton* has said, in which I entirely agree, people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings. The appeal will be dismissed with costs.

Solicitor for Appellant: *Weigall.*
Solicitors for Respondent: *Cottman & Collings.*

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Ex parte JONES. *In re* GRISSELL.

Married Woman—Liability to Bankrupt Law—Separate Estate—Debt contracted after Marriage—Debtor's Summons—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71) *ss.* 6, 7, 8—*Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *ss.* 1, 12—*Rules of Court*, 1875, *Order* XVI., *r.* 8.

A married woman is not liable to the bankrupt law, even though she has separate estate and has contracted engagements after her marriage.

The *Married Women's Property Act*, 1870, has made no difference in this respect.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

Mrs. *Grissell*, the wife of Mr. *C. E. Grissell*, was, under the provisions of a settlement made upon her marriage (after 1870), entitled to the income of certain trust moneys, for her separate use without power of anticipation.

In January, 1879, *C. E. Grissell* entered into a contract with *F. Jones* for the purchase of a leasehold house for £10,500. On the 8th of January Mrs. *Grissell* drew a cheque on her bankers for £500, and handed it to *Jones* for the purpose of paying a deposit in respect of the £10,500. Before, however, the cheque had been presented to the bankers for payment she instructed them to refuse payment, and when it was presented by *Jones* payment was accordingly refused. *Jones* then issued a debtor's summons against Mrs. *Grissell* for £500, which he alleged to be due to him in respect of the cheque. Mrs. *Grissell* applied to the Court to dismiss the summons. She filed an affidavit in which she denied that she was indebted to *Jones* in the amount claimed in the summons, or in any amount whatever, and she said that before and at the time when the cheque was given she was a married woman. The Registrar dismissed the summons. *Jones* appealed.

Winslow, Q.C., and *Crispe*, for the Appellant:—

Married women have been made bankrupt.

[JAMES, L.J.:—That has been in the case of married women trading [separately under the custom of the city of *London*, or when the husband had abjured the realm, or been exiled.]

Ex parte Holland (1) is distinguishable from the present case, because there the married woman had no separate estate, and the debt had been contracted before her marriage, and Lord Justice *Mellish* said (2), "I am not, however, quite satisfied that if the lady had been shewn to have separate property, it might not have made a difference . . . I should be sorry to say that there is no way of making a married woman's separate property liable except in equity; for instance, such property as she might have acquired as a trader." When married women who had traded under the custom of *London* were made bankrupt, it was only in respect of debts contracted after marriage. Sect. 1 of the *Married Women's Property Act*, 1870, shews that the Legislature intended that married women should be liable to the bankrupt law in respect of their separate estate.

[JAMES, L.J.:—The only power to sue a married woman is given by sect. 12, and that is confined to debts contracted before marriage.

COTTON, L.J.:—This married woman has separate property independently of the Act; does the Act affect her at all?]

It shews the intention of the Legislature. When the old cases were decided the law of bankruptcy applied only to traders, even in the case of men. Married women have been allowed to take the benefit of the Insolvent Debtors Acts, and a married woman in prison has been allowed to present a bankruptcy petition.

In *Cooke's* Bankrupt Laws (3) it is said, "Every reason that induces the Courts of Law to make a *feme covert* personally liable for her contracts, equally operates to make her subject to bankruptcy; and it would be the height of cruelty to determine that a woman should be taken in execution for her debts, and, at the same time, preclude her from that benefit which the Legislature affords to honest and industrious traders, sinking under the pressure of undeserved misfortune." In *La Vie* v. *Phillips* (4) it was held that a wife, who was a sole trader in *London*, was liable to a commission of bankruptcy, and Mr. Justice *Wilmot* said (1), "This proceeding is a necessary consequence of the custom. If the wife's goods can be taken in a common execution, they may be taken in execution under a commission of bankruptcy." In *Ex parte Mear* (2), it was held that a commission of bankruptcy could not be against a married woman upon a trading and an act of bankruptcy before the marriage. But there the creditors of the wife had become creditors of the husband, and that was so also in *Ex parte Holland*. In *Ex parte Franks* (3) it was held that the wife of a convict sentenced to transportation was liable to be made a bankrupt if she became a trader, although her husband remained in this country. Bankruptcy is merely a statutory execution for the benefit of all the creditors, and if the separate property of a married woman can be made available to satisfy one creditor it must be liable to an execution for the benefit of all. The remedy against separate property is now enforceable in all the Divisions of the High Court. In *Day* v. *Freund* (4) it was held that a subsisting adjudication of bankruptcy against a married woman was an answer to an action claiming to make her separate estate liable for a debt contracted by her trading separately from her husband under the provisions of sect. 1 of the *Married Women's Property Act*, 1870. The principle of the old decisions was that the general words of the Bankruptcy Acts, which applied to all traders, applied to a married woman, if she was a trader, as much as to any other trader. The ground of the decision was, not that she could be sued at law for the debt, but that her property could be reached by an execution. And now the distinction between traders and non-traders has been abolished.

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(1) Law Rep. 9 Ch. 307.

(2) Ibid. 311.

(3) 8th Ed. vol. i. p. 46.

(4) 1 W. Bl. 570.

[COTTON, L.J. :—Is a married woman who has separate estate a debtor within the meaning of the Bankruptcy Act? Her creditor can only obtain a judgment for payment out of her separate estate.]

The test is this—Can you get at her property? If you can, you should be able to get at it once for all, not piecemeal. It is an

(1) 1 W. Bl. 574.
(2) 2 Bro. C. C. 266.
(3) 7 Bing. 762.
(4) 35 L. T. (N.S.) 551.

advantage to her to allow her to have the benefit of the bankrupt law.

[James, L.J.:—The only result of bankruptcy now is a *cessio bonorum.*]

The reason of the immunity of a married woman from the bankrupt law was that an action could not be maintained against her; she could not defend by an attorney. She can do so now under rule 8 of Order xvi. of Rules of Court, 1875, and, if she can defend an action, she can be sued.

[James, L.J.:—She can defend only by leave of the Court or a Judge.

Brett, L.J.:—That rule only means that the former practice of the Court of Chancery is to apply in all the Divisions of the High Court; it does not enable a married woman to be sued in respect of any cause of action for which she could not have been sued formerly.]

The rule is quite general in its terms.

De Gex, Q.C., and *W. Phipson Beale,* for Mrs. *Grissell,* were not heard.

James, L.J.:—

I think that the appeal cannot be sustained. Before the modern legislation it is admitted that the law had been clearly established, and that it was correctly laid down by Mr. *Cooke,* who was a very great authority on the subject, in his treatise on the Bankrupt Laws (1) as follows:—"But the later determinations appear to have overruled the effect of these cases, and it seems now to be decided, that, although the husband and wife live separate by deed, and the wife has a separate maintenance" (and separate maintenance and separate estate are really the same thing), "yet that she cannot become legally responsible for contracts which she may enter into, as if she were sole and unmarried; and that, therefore, she cannot be sued as a *feme sole,* whilst the relationship of marriage subsists between them, and whilst she and her husband are living in the kingdom. And, if this is the case, it follows that

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(1) 8th Ed. vol. i. p. 47.

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no commission could be supported against her under such circumstances." That was the state of the law at that time. When was it altered? Can a married woman be sued as a *feme sole* because she has separate property? The *Married Women's Property Act* of 1870 contains no provision for suing a married woman except in respect of debts contracted by her before her marriage. If she is not liable to be sued as a *feme sole* in what used formerly to be called a common law action, she is not liable to be sued for a debt at all. In Equity the liability was to have her separate estate taken from her for the benefit of a person with whom she had contracted on the faith of it. That was a special equitable remedy arising out of a special equitable right. But the married woman who contracts in that way is not a debtor in any sense of the word, and, she not being a debtor, the whole foundation of the Appellant's case fails. A debtor's summons is a summons against a debtor. The Respondent is not a debtor, and therefore there was no legal authority to issue a debtor's summons against her, and no proceedings in bankruptcy founded upon it could be effectually taken.

BRETT, L.J.:—

Under the old bankruptcy statutes no person could be made a bankrupt who was not both a debtor and a trader within the meaning of those statutes, and no person could be a debtor within that meaning unless a remedy could be had against him personally as upon and for a debt. It was necessary that the debtor should also be a trader, and a married woman could not, as a general rule, be either a debtor or a trader. But some married women could be both. Married women carrying on trade in the city of *London* could, by the custom of the City, be both, and therefore such married women were within both the conditions of the Bankruptcy Acts. Married women also whose husbands had been convicted of felony and had left the country were treated by the law as women whose husbands were dead, because they were civilly dead, and therefore such women, though they were married, came within the terms of the Bankruptcy Acts. The present *Bankruptcy Act* has taken away one of the two conditions, that of trading. And the argument in support of the appeal must go to this extent, that, by reason simply of the removal of that condition, every married woman who under a settlement is entitled to separate estate can be made a bankrupt. The *Married Women's Property Act* has nothing to do with the case; it is not within its provisions. The difficulty in the way of the Appellant is this, that, although it is no longer necessary that a bankrupt should be a trader, the other condition remains precisely the same as before. A bankrupt must still be a debtor, *i.e.*, a person who can be sued as upon and for a debt. The procedure of Courts of Equity for making the separate estate of a married woman available to satisfy her engagements existed under the old Bankruptcy Acts, just as it does under the present Act. But it did not enable any one to sue a married woman as upon and for a debt in a Court of Equity, and certainly not in a Court of Common Law. It was a peculiar remedy against the separate property of the married woman so long as it existed, but it was not a remedy against her as upon and for a debt. It was a peculiar remedy in the Court of Chancery. A married woman was not and is not now liable to be sued as a debtor, and therefore now, as formerly, she is not liable to be made a bankrupt.

COTTON, L.J.:—

The question is, whether or no a married woman having separate estate is liable to be made a bankrupt. In my opinion the Judicature Acts and Rules have no effect on the question; they give no new rights as against married women, though they have made some difference in the mode in which they may be sued. Nor has the *Married Women's Property Act* any application. The question is simply whether a married woman having separate estate can be made a bankrupt. If she can, it would be an anomalous kind of bankruptcy. What property would vest in the trustee under the bankruptcy? Certainly not all her property. Her real estate not settled to her separate use would not. Only the separate estate, against which her creditors would have had an equitable remedy, could be considered as vested in the trustee. The question is, whether it can be said that a married woman who has separate estate, on the faith of which she has made engagements, can be said to be a debtor within the meaning of the *Bankruptcy Act.* A debtor's summons is a proceeding only against a debtor, and it is instituted for the purpose of founding proceedings in bankruptcy against the debtor under the *Bankruptcy Act.* It is said that a married woman is a debtor, because she is liable to have proceedings taken against her to obtain satisfaction of such a debt as this out of her separate estate. But that involves a fallacy. A debtor must be a person who can be sued personally for a debt, and who is liable to all the consequences of a personal judgment against him. But that is not at all the position of a married woman, even though she has separate estate; proceedings cannot be taken against her personally to enforce payment of a debt. Formerly Courts of Equity compelled the satisfaction of her general engagements out of her separate property, and now that is done by all the Divisions of the High Court. But it is only a proceeding to compel the satisfaction out of the separate property of engagements made with reference to and upon the credit of it. As Lord Justice *James* said in *London Chartered Bank of Australia* v *Lemprière* (1), "The married woman intended to contract so as to make herself, that is to say, her separate property, the debtor." It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the engagement. She herself is not a debtor within the meaning of the *Bankruptcy Act.* It is said, however, that a married woman who had traded separately from her husband under the custom of *London* could be made a bankrupt. But why was that? Because by the trading she had become personally liable to be sued for debts contracted in the trading, and liable to all the consequences of a personal judgment. On that ground it was held that she was entitled to the protection of the bankrupt law. I cannot help thinking that what was said by Lord *Cairns* in *Ex parte Holland* goes far to decide the present case. He evidently considered that under the law as it existed before the *Married Women's Property Act* of 1870, a married woman was not liable to be made a bankrupt in respect of her separate property, and that, although the Act had made her liable to be sued, it could not, in the absence of clear words, be held to have made her liable to be made a bankrupt. Though it was not a direct decision on the point, it was an indication of the Lord Chancellor's opinion. In my opinion the Act of 1870 does not render a married woman who has separate estate liable to be made a bankrupt. I should add that I think that when sect. 12 of that Act says that a married woman shall be liable to be sued for debts contracted before marriage, it only means liable to be sued as in equity for the purpose of attaching her separate estate.

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(1) Law Rep. 4 P. C. 597.

The appeal was dismissed with costs.

Solicitor for Appellant: *J. Girdlestone.*
Solicitor for Respondent: *S. B. Booth.*

Ex parte MORIER.
In re WILLIS, PERCIVAL, & CO.

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10QBD2

Proof in Bankruptcy—Mutual Credits—Equitable Set-off—Accounts with Bankers in Joint Names of Executors and of one Executor who is also Residuary Legatee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 39.

An executorship account was kept with bankers in the joint names of the two executors, who were brother and sister. The brother, who was the residuary legatee under the will, kept another account of his own with the bankers. The bankers filed a liquidation petition, and at that time there was a balance standing to the credit of the joint account, but the other account was overdrawn. Securities had been set apart to answer the legacies bequeathed by the will, and the testator's debts and funeral and testamentary expenses had been paid. But the executors were jointly liable for some rates and taxes and a solicitor's bill of costs which had not been paid:—

Held, that the one account could not be set off against the other in the liquidation of the bankers.

The rules of equitable set-off or mutual credit could not apply unless the brother was so much the person solely beneficially interested in the balance of the joint account that a Court of Equity, without any terms or any further inquiry, would have compelled the sister to transfer the account into the brother's name alone.

Bailey v. *Finch* (1) and *Bailey* v. *Johnson* (2) explained.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

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(1) Law Rep. 7 Q. B. 34.
(2) Law Rep. 6 Ex. 279; Ibid. 7 Ex. 263.

D. R. Morier, by his will, dated the 14th of May, 1873, appointed his son *R. B. D. Morier*, his daughter *Dorothea C. H. Morier*, and *G. H. Sawtell*, executors thereof. He gave to his daughter an annuity of £75 for her life. He also gave to her the sum of £10,000 New Three per Cent. Annuities. He gave his plate, china, furniture and effects to his son and daughter, to be equally divided between them. He gave to his servant *Louis Decoppet* an annuity of £25. He directed that the legacy duty on the legacy and annuities thereby given should be paid out of his personal estate. He devised and bequeathed his real estate and the residue of his personal estate to his son, his heirs, executors, administrators, and assigns.

The testator died on the 13th of July, 1877, and the will was proved by the son and daughter only.

The testator kept a banking account with Messrs. *Willis, Percival, & Co.*, bankers, and at the time of his death there was standing to the credit of the account a balance of £492 11*s.* 7*d.* This balance was, after the will had been proved, carried to the joint account of the son and daughter, as executors of the testator. They continued to pay to the credit of the account moneys belonging to the testator's estate, and to draw cheques upon it for the purpose of making payments in relation to the estate. The son also kept a separate account of his own with the bankers.

The assets of the testator at the time of his death consisted in part of a sum of £8601 9*s.* 5*d.* New Three per Cent. Annuities, standing in his name, four debentures of the *Great Eastern Railway Company* for sums amounting to £3600, and thirteen bonds of the *United States of America* for $1000 each. The debentures and the bonds were in the custody of the bankers. On the 24th of August, 1877, an agreement in writing was entered into between the son and daughter, by which it was agreed that the £8601 9*s.* 5*d.* New Three per Cent. Annuities should be transferred into the name of the daughter, on account of the legacy of £10,000 such annuities bequeathed to her by the testator, and that one debenture of the *Great Eastern Railway Company* for £1000 should also be transferred to her, the same to be taken at the market value thereof on the day of transfer, on further account of the legacy, and that such a further sum of New Three per Cent. Annuities, as

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with the sum of £8601 9*s.* 5*d.*, and the value of the debenture, if invested in the same stock on the day of transfer, would make up the sum of £10,000 New Three per Cent. Annuities, should be purchased out of the testator's estate in the name of the daughter, in satisfaction of her legacy. It was further agreed that ten of the *United States* Bonds, representing $10,000 or £2000, should be considered as set apart and held to provide for the payments of the two annuities given by the will out of the interest thereof, with power to resort to the capital in case such interest should not be sufficient.

After this agreement had been entered into the £8601 9*s.* 5*d.* New Three per Cent. Annuities and the £1000 debenture were transferred into the daughter's name, and a further sum of £348 10*s.* 7*d.* New Three per Cent. Annuities was purchased in her name.

In December, 1877, the other three railway debentures were sold by order of the executors, and the proceeds, amounting to £2629 14*s.* 9*d.*, were placed to the credit of the executors' account with the bankers, and on the same day a sum of £2632 10*s.* was withdrawn from the account and was invested in the purchase of £2600 bonds of the *Grand Trunk Railway of Canada.* In January, 1878, a fresh arrangement was come to between the son and daughter, and the whole of the *United States* Bonds were sold for £2749 10*s.* which was placed to the credit of the executors' account with the bankers.

On the 1st of February, 1878, an agreement in writing was entered into which provided that £2000 of the *Grand Trunk Railway* Bonds should be substituted for the *United States* Bonds, and should be considered as set apart and held to provide for the payment of the two annuities, in the same manner as the *United States* Bonds had been held, and the son agreed to indemnify the daughter from all loss or damage which might accrue to her by reason of the security for the annuities.

On the 1st of March, 1878, the bankers stopped payment, and they afterwards filed a liquidation petition, under which a trustee of their property was appointed. At the time of the stoppage a balance of £1404 5*s.* 6*d.* was standing to the credit of the joint account of the son and daughter as executors, and at the same time the son's own account was overdrawn to the extent of £1206 2*s.* 3*d.* The debts and funeral and testamentary expenses of the testator, and the duty on the legacy and annuities bequeathed by his will, had all been paid. A sum of about £10 was due for rates and taxes in respect of the testator's house up to Lady Day, 1878, and there was a bill of costs (amounting to about £50) due to the solicitors who had been employed by the executors in relation to the testator's estate. A cheque had actually been drawn by the executors to pay the solicitors' bill before the stoppage of the bankers, but it had not been presented before the stoppage took place.

The son claimed to set off the balance due from him to the bankers on his own account against the sum due from the bankers on the executors' account, and to prove in the liquidation for the difference of £198 3*s.* 3*d.*, on the ground that the testator's estate was cleared of all liability, and was therefore a net residue belonging to himself as residuary legatee, and that consequently the sum standing to the credit of the executors' account belonged in equity to himself alone. The trustee rejected the proof, insisting that the set-off could not be allowed, but that the son must pay in full the overdrawn balance of his own account, while a proof must be made in the liquidation in respect of the balance standing to the credit of the executors' account. The son applied to the Court for an order that his proof for £198 3*s.* 3*d.* should be admitted. The daughter made an affidavit in support of the application, in which she said that she did not consider that at the time of the stoppage of the bankers she had any claim in respect of her annuity upon the balance standing to the credit of the executors' account.

The Registrar affirmed the decision of the trustee, holding that the case was governed by *Middleton* v. *Pollock.* (1)

The son appealed.

De Gex, Q.C., and *Finlay Knight*, for the Appellant:—

The balance which stood to the credit of the executors' account was practically a clear fund belonging in equity to the Appellant absolutely. The sister says that she considers that she had no

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(1) Law Rep. 20 Eq. 29.

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claim upon the fund, and the other annuitant makes no claim. The fund set apart to answer the annuities is ample. The fact that there is the liability to pay £10 for rates and taxes and £50 for solicitors' costs cannot exclude the right to set off.

[James, L.J., referred to *Jones* v. *Mossop* (1).]

In *Bailey* v. *Finch* (2) it was held that a customer of some bankers, who had overdrawn his account, was entitled to set off in their bankruptcy against the overdrawn balance of his account, a balance due to him from the bankers on another account, which stood in his sole name as executor of a will under which he was also residuary legatee.

[James, L.J. :—In that case the customer was the sole executor of the will, and there was a legal right of set-off unless it was controlled by some equity. In the present case the executorship account stands in joint names, and there is no legal right of set-off. You have to establish that there is an equitable right of set-off.]

In *Bailey* v. *Finch* the Court held that, the assets being sufficient to meet all claims, and leave a surplus for the residuary legatee exceeding the balance in the banker's hands, the mere circumstance that the testator's estate had not been actually liquidated could not countervail the legal right of set-off. That applies to the present case, and it would be a pure technicality to say that the balance standing to the credit of the executor's account was not a clear fund. The interposition of a trustee for a beneficial owner does not prevent the right of set-off: *Cochrane* v. *Green* (3). In *Bailey* v. *Johnson* (4) a customer of some bankers owed them money and was adjudicated a bankrupt on their petition, and the trustee in his bankruptcy paid the proceeds of his estate to an account with the bankers. The bankers were afterwards adjudicated bankrupts; the sum paid in by the trustee still standing to his credit with them. After this the adjudication against the customer was reversed on appeal. It was held that the customer was entitled to set off the sum standing to the credit of the trustee's account against his own debt to the bankers. There,

(1) 3 Hare, 568.

(2) Law Rep. 7 Q. B. 34.

(3) 9 C. B. (N.S.) 448. 7 Jur NS 549.

(4) Law Rep. 6 Ex. 279; Ibid. 7 Ex. 263.

when the money was paid into the bank, the trustee was a trustee for the creditors.

[BRETT, L.J.:—But when the bankruptcy was annulled the trustee became a mere name.]

The annulling of an adjudication does not invalidate the previous proceedings under it: *Smallcombe* v. *Olivier* (1). The trustee might have some claim on the fund.

Winslow, Q.C., and *Romer*, for the trustee were not heard.

JAMES, L.J.:—

This may be a hard case, but of course we must deal with it on general principles. There were two accounts, one the account of *A.*, the other the account of *A.* and *B.* It is said *A.* and *B.* were executors, and *A.* was also the residuary legatee, and therefore entitled to the whole of the fund. But the fund had never been liquidated so as to become a trust fund. There had never been anything approaching to a liquidation, never anything like a settlement of accounts, so that we could say that at any particular moment the fund standing in the bank to the account of *A.* and *B.* had become, by reason of the conduct of *A.* and *B.*, the trust fund of *A.* so as to make it clear that *A.* and *B.* were mere trustees for him. Unless it could be made out clearly that *A.* and *B.* were trustees of the fund for *A.*, it seems to me there could not be an equitable set-off, because the money is due *in autre droit*, and where the money is due *in autre droit* the only exception which equity has introduced into the principle of a legal set-off is when the money is really and truly the property of one man in the name of another, not when the result of taking the accounts would be to shew that the ultimate balance would be his property, but when it is nothing but what we used to call in the Privy Council a Bonamee account, that is, an account put by one man into the name of another merely for his own convenience.

I have referred during the argument, in illustration of the principle, to *Jones* v. *Mossop* (2). There, by great good luck, the Plaintiff was enabled to obtain an equitable set-off. The

(1) 13 M. & W. 77.

(2) 3 Hare, 568.

Plaintiff in that case was a bond debtor of one *John Reed*. *John Reed* died intestate, leaving an only son, his sole next of kin, and he took out administration to his father's estate. The son afterwards became insolvent and died, and the assignee in his insolvency took out administration *de bonis non* to the father, and then sued the Plaintiff upon his bond. It so happened that the Plaintiff was a creditor of the son upon a distinct account, having paid a sum of money for which he was surety for the son. Then he filed a bill, claiming to have the debt due to him from the son set off against the bond upon which the son's assignee, as the legal personal representative of the father, was suing him. He had the great good luck to succeed in obtaining that set-off, but upon this ground, that the Defendant's answer contained this distinct admission, that the Defendant believed that the money due upon the bond was part of the net residue of the estate of *John Reed*, and that the same became legally and equitably the absolute property of *Richard Reed*, his son, and that he (the son) became entitled to recover the moneys due thereon for his own use and benefit. And the Defendant admitted that he accepted the office of assignee, and that thereby the estate and effects of *Richard Reed* became vested in him, and, among other things, the equitable and beneficial ownership of the bond. Upon that Vice-Chancellor *Wigram* said (1): "A very slight variation in the answer from its present shape might have concluded the case as against the Plaintiff on this motion. But, if the effect of the answer be that before the 30th of January, 1839, the date of the vesting order, *Richard Reed*, as administrator and next of kin of *John Reed*, had become beneficial owner of the bond, there is no technical reason founded in the origin of his claim, why the Court should not treat the bond as his, and give the Plaintiff the equity he claims." That was because there was a clear admission that the thing had become legally and equitably the absolute property of *Richard* the son, that he had become the beneficial owner, and it was that beneficial ownership which had become vested in the assignee in his insolvency. There was this difficulty arising in the case that, in a subsequent part of the answer, the Defendant said that he believed certain of the debts of *John Reed*

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(1) 3 Hare, 574.

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still remained undischarged, and that there were sufficient assets to pay the debts, exclusive of the bond, and he submitted he was not bound to set forth what debts were unpaid, and the Vice-Chancellor said (1): "After the suggestion that the debts of *John Reed* had not been fully paid, I felt a difficulty in treating the money due upon the bond otherwise than as the assets of *John Reed*; but the admission in the answer is most distinct—that the bond itself is part of the beneficial estate of *Richard Reed*, and that the Defendant obtained letters of administration empowering him to recover it, not as part of the estate of *John*, but as part of the estate of the insolvent. I think that that admission relieves the case of all difficulty with regard to the fact of the debts being due in different rights."

It is quite clear that if there had not been that distinct admission in the answer, Vice-Chancellor *Wigram* would not have been able to allow the set-off which was claimed.

That, as it seems to me, shews the principle on which we must decide the present case. If the sister had joined the brother in acknowledging (either in words or in substance) that the money in the bank was part of the net residue belonging to him, then the case would have been brought within the ordinary principle of a debt due from a man and a debt due to the trustee of that man. And that shews the distinction between this case and those cases, such as *Cochrane* v. *Green* (2), on which Mr. *De Gex* has relied. The net balance must be ascertained, so as to make it a trust fund, before you can apply those cases.

The only other case which it is important to deal with is *Bailey* v. *Finch* (3). There all the learned Judges start with this (which of course distinguishes that case from the present), that really in point of law there was but one account, and there was no debt except upon taking the two accounts together. The mere fact of the two accounts being put on different pages of the ledger could have no more effect than if an account had gone over from one page of the bank's ledger to another, or than if a man, as a mere matter of account, had kept different accounts, such as a farm account, a colliery account, or a house account, merely for his own convenience for ascertaining how moneys came in and how they had been applied. There the Judges started with that. Then they arrived at the conclusion that, there being that legal (not equitable) right of set-off, but the right to put the one account against the other and say there is a legal debt, being the balance of the items on both sides, there was no sufficient notice of any equity to countervail the legal right. It is not necessary to consider how that case would have stood if there had been any claims made by other persons against the estate. That was the *ratio decidendi*, and that is all that it is necessary for us to deal with. But in the present case it is quite clear (though no doubt the sister desired to assist her brother in recovering as much as he could of what had been lost through the bank's failure) that they were in the position of joint creditors of the bank, having joint assets in the bank and having joint liabilities to discharge, and not merely liabilities in respect of the estate. There might have been claims in respect of the annuities, which had never been released and never fully provided for in the sense that a fund had been so clearly set apart to answer them that the executors were entitled to deal with the other assets as a residue. And it is obvious that the two had incurred joint debts. There was a debt due to their solicitors, and there was a debt due for rates and taxes in respect of which the two were liable, and they had this joint credit to draw upon for the purpose of meeting those joint liabilities. It appears to me we cannot, where there is really a distinct estate, take an account, and then say, upon taking the accounts of the estate, there would be a large sum due to the residuary legatee, and that circumstance converts that which was a debt due from the bank to the two into a debt due to the two as trustees for the one. That is a proceeding which has never been taken in cases of equitable set-off, which is itself an invention and deduction of Courts of Equity. Equitable set-off has always been confined to cases where there was a plain and distinct admission or evidence of there being a simple liquidated and ascertained trust fund. It has never been applied to cases where, upon a final settlement of the accounts between two persons and one, the account would result in a balance in favour of the one. I think the Court has never yet taken accounts in order to see how much of a fund

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(1) 3 Hare, 576.

(2) 9 C. B. (N.S.) 448. 7 Jur N S 54

(3) Law Rep. 7 Q. B. 34.

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standing in the name of two persons in a bank would ultimately, upon the balance of the accounts, turn out to be the property of one of them, so as to enable that balance to be a set-off against a sum due by that one to the bank.

It may be a hard case, but I think we cannot dissent from the decision of the Registrar without introducing an entirely new principle, which might be attended with great inconvenience. At all events, there is no ground either in principle or authority for our so doing.

BRETT, L.J. :—

I am of the same opinion, and for the same reasons.

COTTON, L.J. :—

I have arrived at the same conclusion. Of course we must not adapt our decisions to meet the exigencies of particular cases. Unless we find there is some rule or principle enabling us to say that a set-off can be allowed, we cannot allow it.

The question is whether there can be an equitable set-off as between the two accounts kept with the bank, the one in the name of Mr. *Morier*, the other in the name of Mr. *Morier* and his sister, who are co-executors of their father. It is perfectly clear that there can be no set-off at law. Mr. *De Gex* says that we must look to the equitable rights, and, no doubt, if he could establish that the name of Miss *Morier* was there simply as joint trustee with her brother, and for her brother, then the money would be to all intents and purposes in equity her brother's property, and he would be right in saying that there ought to be a set-off. But what is it? It is really part of the estate of the testator. It was, as I understand, wholly or in part, a sum which stood to his credit at the time of his death, and it was, wholly or in part, transferred to them as his executors as part of his estate, and if it was clearly transferred to them for the purpose of the administration as an executorship account, that is to say, an account which was liable to pay all the debts and legacies of the testator, and also to make provision for the annuities bequeathed by his will, and for all the expenses which executors must incur in the administration of their testator's estate, in my opinion we cannot hold that, at the time of the bankruptcy, it was no longer executorship money, but money held by the two as trustees for Mr. *Morier*, unless we can see that that has been done which enables us to say that it was liquidated and ascertained to be a clear net residue, which he was entitled to have carried over to him absolutely, without any further accounts being taken or anything further being done.

I looked at the agreement between the parties to see whether there had been any agreement or declaration by Miss *Morier* that, after the provisions which had been made, the whole of the balance of the estate was a clear residue belonging to her brother. But there is no such agreement. There is an agreement as to how certain things are to be provided for, an arrangement as to a change of investment, and an agreement by the brother to indemnify the sister, but there is nothing like the taking of an account so as to ascertain satisfactorily that this sum was no longer to be held by them in their joint names as an executorship account, but was to be held by them in their joint names as a simple trust fund to which the brother was entitled as the absolute sole beneficial owner. Therefore, I am of opinion that, there being no set-off at law, we cannot hold that there can be a set-off in equity.

Only two cases were much pressed upon us by Mr. *De Gex*. *Bailey* v. *Johnson* (1) was a case where a bankruptcy had been annulled, and a set-off was allowed as between money which had been paid in by the trustee before the bankruptcy was annulled, and money due to the bankers by the person who had been adjudicated a bankrupt. But that case was decided (certainly by the Exchequer Chamber) on the ground that, by virtue of sect. 81 of the *Bankruptcy Act*, on the annulling of the bankruptcy the property reverted to the person who had been declared bankrupt, and became his as from the time when it was paid into the bank, and therefore it was a clear case of set-off.

As to *Bailey* v. *Finch* (2), I think it is unnecessary to express any opinion whether the Court, in dealing with the matter then before them, correctly applied equitable principles to the circum-

(1) Law Rep. 6 Ex. 279; Ibid. 7 Ex. 263.

(2) Law Rep. 7 Q. B. 34.

stances of the case. What they did decide was this: They had to deal with a legal right of set-off, because both the accounts were the accounts of one person, and at law there was a right of set-off. But it was attempted to preclude that right by the fact that one of the accounts had been opened in the name of the customer as executor. There was a legal right to set off, and the question was whether there was a sufficient equitable ground for preventing the legal right from taking effect. And, as I understand it, the principle of the decision (whether right or wrong) was this, not that the fund was a trust fund from the nature of the account, or that the bankers had notice of that, but that they had notice that it was an account against which claims were likely to be made, and that if claims had at the time of the bankruptcy been made against it, they would have prevented the legal right of set-off from arising, but that, as it was not shewn there were any equitable claims against the fund, the legal right of set-off could not be interfered with. That was the *ratio decidendi,* as I understand it.

It is unnecessary to say how one would have decided such a case, or whether it was a correct application of the law, for it in no way touches this case. The question we have to deal with is whether, when there is no legal right of set-off, it can be said that the money so absolutely belongs to that one of the two persons in whose joint names the account stands, who has another account of his own, that we must treat it as his sole property, and require the balance to be struck between the two accounts.

BRETT, L.J.:—

My view is this, that, the account standing in the names of the brother and sister, the case could not have been brought within the rules of equitable set-off or mutual credit, unless the brother was so much the person solely beneficially interested that a Court of Equity, without any terms or any further inquiry, would have obliged the sister to transfer the account into her brother's name alone.

JAMES, L.J.:—

The appeal will be dismissed with costs. The Lord Justice

Brett has expressed very nearly in the language of a code that which has been said by the Lord Justice *Cotton* and myself at greater length.

Solicitors for Appellant: *Bridges, Sawtell, & Co.*
Solicitors for Trustee: *Lawrance, Plews, & Baker.*

In re SOUTH LLANHARRAN COLLIERY COMPANY. *Ex parte* JEGON.

C. A.
1879
July 25.

Company—Guarantee of Dividend of 5 *per Cent.—Return of Capital—Companies Act*, 1862, s. 12.

J. contracted with a trustee for an intended company to sell to the company a coal mine and works for £35,000, of which £10,000 was to be paid in money and the remainder in paid-up shares of the company; and he agreed to pay the company during the first two years of its incorporation such a sum as together with the net profits of the company would be equal to interest at 5 per cent. on the paid-up capital; such money to be repaid to him in a certain event. The company was formed, and the contract was recited and adopted in the articles of association. The profits not being sufficient to pay 5 per cent., *J.* paid a sum of money to the directors for distribution among the shareholders to make up the deficiency in pursuance of his contract. After the last payment became due, but before it was paid, the company was wound up voluntarily, and *J.* paid to the shareholders the amount necessary to bring the last dividend up to £5 per cent. The liquidator claimed the money as part of the assets of the company:—

Held (reversing the decision of *Hall*, V.C.), that the money due from *J.* under his guarantee was properly payable to the shareholders, and was not part of the assets of the company; and that the contract was valid, and was not an evasion of the *Companies Act*, 1862, s. 12.

THIS was an appeal from a decision of Vice-Chancellor *Hall*, made in Chambers in the winding-up of the *South Llanharran Colliery Company, Limited.*

The company was formed in December, 1873, with a nominal capital of £75,000, in 7500 shares of £10 each, for the purpose of purchasing and working a colliery at *Llanharran*, in *Glamorganshire.*

By an agreement, dated the 19th of December, 1873, between *Trew Jegon*, the lessee of the *Llanharran Colliery*, and *C. Eley* (on behalf of the intended company), it was agreed that *Jegon* should sell to *Eley* on behalf of the company his interest in the lease; that the consideration for the sale should be £35,000, payable as to £10,000 in cash, and as to the remaining £25,000 by the allotment and issue to the said *T. Jegon* or his nominees of 2500 fully paid-up shares in the capital of the company, and the payment of a royalty of 1*d.* per ton on all coal and ironstone, and a royalty of ½*d.* per ton on all fireclay got by the company.

By clause 7, *Jegon* agreed with *Eley*, on behalf of the said intended company, to pay to the company during two years from the date of its incorporation such a sum as together with the net profits of the company should be equal to interest at the rate of 5 per cent. per annum on the capital for the time being paid up, such payments to be made half-yearly.

By clause 8, all moneys paid by *Jegon* by virtue of the last preceding clause were to be repaid to him out of the surplus profits which might in any subsequent year remain after payment in each such subsequent year of a dividend of 10 per cent. per annum for that year on the capital for the time being paid up.

The articles of association, which were also dated the 19th of December, 1873, adopted the agreement with *Jegon.* They contained, among others, the following stipulations:—

Art. 101. "No dividend or interim dividend shall be payable except out of the profits arising from the business of the company, but they shall not prevent the directors from paying interest on moneys received by them in anticipation of calls, provided such interest does not exceed £5 per cent."

Art. 102. "The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they shall deem expedient for the purpose of meeting contingencies or for equalising dividends, or for repairing or maintaining the works and plant connected with the business of the company or any part thereof, and the directors may invest the several sums so set apart or any part thereof respectively upon such securities other than shares in the capital of the company as they may select."

The sum of £10,000 was paid to *Jegon*, and he invested it in the purchase of shares of the company, which he held in addition to those allotted to him under the agreement. He became one of the directors of the company.

The profits of the colliery not proving sufficient to pay a dividend of 5 per cent. to the shareholders, *Jegon* was called upon by the directors to pay, and did pay, under his guarantee, various sums of money to the directors, which were distributed among the shareholders. These payments were made on the 22nd of July, 1874, the 17th of February, 1875, and the 1st of September, 1875.

On the 2nd of August, 1876, a resolution was passed to wind up the company voluntarily, and a liquidator was appointed.

On the 19th of December, 1876, *Jegon* paid a further sum of £851 16*s*. 5*d*. to the shareholders to make up their half-year's dividend, which had become due in December, 1875, to 5 per cent. This payment was disallowed by the liquidator on the ground that it ought to have been made to the liquidator on behalf of the company, and not to the individual shareholders. The matter having been brought before the Vice-Chancellor, his Lordship took the same view, and made an order directing *Jegon* to pay the sum of £851 16*s*. 5*d*. into Court to the credit of the liquidator. From this order *Jegon* appealed.

J. Pearson, Q.C., and *Whitehorne*, for the Appellant:—

The money paid by the Appellant to the shareholders under his guarantee was no part of the assets of the company. It never could, under any circumstances, have been claimed by the creditors. It was paid to the shareholders in lieu of net profits. The assets consist of the property of the company, the uncalled capital, and the earnings of the company: this money was neither of these. If it had been paid to the directors or to the liquidator, it would only have been paid to them as trustees for the shareholders, and they could not have applied it to paying the debts of the company. It is true that the directors had power under the 102nd of the articles of association to apply the profits as they thought proper, but that applied only to the earnings of the company, not to such a payment as this: *In re Stuart's Trusts* (1); *In re Gellydeg Colliery Company*, before Vice-Chancellor *Malins* on the 13th of April, 1878.

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(1) 4 Ch. D. 213.

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Higgins, Q.C., and *Giffard*, for the liquidator:—

The money in question was part of the assets of the company, and therefore ought to have been paid to the liquidator. That is the reasonable construction of the contract. *Jegon* was interested in the success of the company, and he guaranteed to assist it for a certain time. If he had agreed to pay for the repairs of the works, or to remit the royalty in certain events, there could be no doubt that the company and their creditors would be entitled to the benefit. The contract was with the company, not with the shareholders, and the payment was to be made to the company. The amount of payment was regulated by the profits, but the contract does not say that it is to be considered as profits.

This construction makes the contract a legal and reasonable one; but if the construction contended for by the Appellant be correct, the contract was *ultrà vires* and illegal. It was a contract for a return of part of the capital to the shareholders, and among others to *Jegon* himself, the vendor of the mine, for he was the largest shareholder in the company. It was, in fact, a contract for a reduction of the purchase-money in certain events, for the benefit of the vendor and the other shareholders at the expense of the company. Such a contract is a device to evade the 12th section of the *Companies Act*, 1862, and is void: *In re National Funds Assurance Company* (1).

JAMES, L.J.:—

There was nothing dishonest in this transaction, no device or contrivance to avoid or evade any Act of Parliament, or any general law; there was nothing done but what was natural and reasonable. A man who had property to sell which he thought very valuable, said that as a test of his *bona fides* he was willing to guarantee a dividend of 5 per cent. during two years, which was to be repaid out of subsequent dividends if and when the shareholders should get more than 10 per cent. I am unable to see anything on the face of this agreement that can be considered as a fraudulent device. We must, therefore, consider what was the real meaning of the contract with reference to all the surrounding circumstances, and then apply the legal consequences. In doing so we ought to look at the contract in connection with the articles of association. The contract with *Jegon* was made before the company was formed, and would have been void as between the company and *Jegon* unless it had been confirmed by the articles.

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(1) 10 Ch. D. 118.

The articles contained the usual provision (clause 101) that no dividend should be payable except out of the profits of the business of the company; but the directors might pay interest on moneys received by them in anticipation of calls at 5 per cent.; and by clause 102 the directors had power to set aside any part of the profits so as to make a reserved fund to meet contingencies.

Then we come to *Jegon's* contract. If read together with the articles, its meaning is that if the dividends declared under Articles 101 and 102 should not amount to 5 per cent. he would make them up to that amount. Could it have been intended that this should be paid to the company for working purposes? Could it have been meant for any other purpose than to make up the dividends to the specified amount? Could it have been set aside as profits under Article 102? If not, how could it have been meant to increase the capital of the company? I think any man of business would have considered it not a sum to be added to the working funds, but as intended to put the shareholders in the same position as if the company had made profits to a sufficient amount; in fact to secure the shareholders the same dividend as if the company had been able to pay a dividend of 5 per cent.

This is made still more clear by the 8th clause of *Jegon's* contract, by which it was provided that if he had to pay this money the future dividends, after payment of 10 per cent., were to be applied to recoup him what he had paid. The real meaning of the contracting parties was that the contract was to be for the benefit of the shareholders, not of the company. The payment to the company by *Jegon* was mere machinery—the company was only the hand by which the money was to be paid to the shareholders; it was to be paid to the company as into an office, that it might be distributed to the shareholders. That was what the parties really meant by the contract, and there was nothing contrary to morality or honesty in carrying it into effect.

BRETT, L.J.:—

I am of the same opinion. The first question is what is the construction of the agreement. To arrive at this we must consider the object of the agreement. This was the purchase of a mine and the formation of a company to work it. The vendor could not get the purchase-money unless the company was formed, and the mine could not be worked unless shareholders were found; therefore it was for the advantage both of the company and the vendor that shareholders should be induced to join the undertaking. That being so, we come to the construction of the 7th clause of the contract. *Jegon* agrees, not to guarantee that the proceeds of the mine should exceed a certain sum, or that the working expenses should not exceed a certain sum, but that he would pay such a sum as together with the net profits of the company would be equal to interest on the paid-up capital at the rate of 5 per cent. To whom is interest payable out of the net profits of a company except to the shareholders? It is clear that it was intended to be an inducement to shareholders to join the company; it was a guarantee that they should have interest on their capital at 5 per cent. for two years.

Then when we look at the condition under which *Jegon* was to be repaid we find that the 8th clause provides that this is to be done when there has been a dividend of 10 per cent. That seems to me a strong proof that the other clause is meant for a stipulation that a dividend of 5 per cent. should be paid. If so, this is a guarantee that during the whole period of two years a dividend of at least 5 per cent. should be paid. That must mean that it should be paid to the shareholders. Therefore the company must take the money as a bare trustee for the shareholders. I feel no doubt that any man of business would put this construction on the contract.

Then it was said that the contract is void and illegal. Mr. *Higgins* argued that the vendor had been paid his purchase-money, and that this was a payment back of part of it, and that it was in contravention of the *Companies Act*. If in this or in any other case we saw any device, or any intention to evade the Act, we should know how to deal with it. But the Vice Chancellor himself thought that there was no device in the transaction; and I do not see any device in it. It is very different from a case in which a vendor would be willing to take £5000, and should agree that he was to have £10,000 paid him and was to repay £5000 in some particular event. No doubt that would be a repayment of capital; but that is not this case. It cannot be said to be a repayment of capital in any sense.

Cotton, L.J.:—

I am of the same opinion. There are two questions in the case. First, what is the construction of the contract; and, secondly, whether the contract is legal or not.

First, as to the construction of the contract. The real question is whether the payment was to be made by *Jegon* as part of the property of the company, or whether it was to be made to them as a trust fund appropriated to certain purposes, and not as part of the company's property available for payment of their creditors. I have arrived at the same conclusion as the Lords Justices, that it was intended for the benefit of the shareholders. It could not have been meant to go into the capital of the company, for that would not have had the effect of securing to the shareholders what it was intended to give them. If so it is a fund which the liquidator cannot say was improperly paid to the shareholders, who were the *cestuis que trust* of the company. The liquidator says that it may be that the company intended to say, "Pay it to us and we will hold it as part of the assets;" but that if there is any vice in the transaction, if it was a device by which a portion of the purchase-money was to be returned to the shareholders, it was a void contract. But is there any ground for saying that? It was not a portion of the purchase-money which was to be set apart and returned to the shareholders, but the vendor, having received the whole of the purchase-money, made a personal contract by which it was intended to secure to the shareholders interest on their capital at £5 per cent. during two years. If we look at the articles we find no provision as to how the money paid by *Jegon* is to be distributed. There is a provision that the dividends are only to be paid out of the profits of the business. That does not apply to any money payable under this contract. It is something outside

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In re SOUTH LLANHARRAN COLLIERY COMPANY. *Ex parte* JEGON.

the profits of the company. It is true that in *In re Stuart's Trusts* (1) the sum payable was held to be part of the profits; but in that case it was expressly stipulated that the payment under the guarantee should be applied as a dividend. So that the question was avoided by the special form of the contract. Could the money in this case have been applied by the company as part of the general assets? No one could arrive at such a conclusion. In the contract *Jegon* says he will pay certain sums of money as a fund to be appropriated to the shareholders. The purchase-money ceased to be part of the capital of the company when it got into the pocket of *Jegon;* and whatever payment he made was made out of his own money. Unless it could be shewn that the real purchase-money was less than £10,000, it is wrong to say that the money paid by *Jegon* was paid out of the assets of the company. Therefore the contract is not open to that objection. The true construction of the agreement being that the money was to be paid to the company for distribution among the shareholders, payment to the shareholders, passing by the trustee, was a good payment.

There is no pretence for saying that there was anything fraudulent in the transaction; and therefore I am of opinion that the liquidator has no claim, and the appeal must be allowed with costs.

Solicitors: *Vallance & Vallance,* agents for *Murly & Sons, Bristol; Jenkinson & Olivers.*

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(1) 4 Ch. D. 213.

In re GOVERNMENT SECURITY FIRE INSURANCE COMPANY.

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Company—Fully paid-up Shares—Payment in Cash—Consideration of past Services—Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.

The proprietor of a newspaper agreed with a company to insert for them a series of advertisements in his newspaper, and to accept payment of his account in fully paid-up shares. He inserted the advertisements and sent in his account to the company. The company accepted the account and allotted him fully paid-up shares to the amount thereof. The contract was not registered in pursuance of the *Companies Act*, 1867, s. 25, and the company was afterwards wound up:—

14 Ch D 4
437, 4
635, 65
18 Ch D 5

Held (reversing the decision of *Hall*, V.C.), that, the allottee having originally agreed to accept shares in payment of his account, the company never came under any liability to pay for the advertisements in cash; and therefore that the allottee must be placed on the list of contributories for unpaid shares.

Fothergill's Case (1) followed.

Spargo's Case (2) distinguished.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (3).

The *Government Security Fire Insurance Company* was incorporated on the 17th of November, 1875.

In the month of November, 1876, the company entered into an agreement with Mr. *White*, the proprietor of the *Ulster Gazette*, that he should advertise their prospectus in his newspaper upon the terms stated in a letter dated the 29th of March, 1876, from the secretary of the company to Mr. *White*, the material part of which was as follows:—

"I beg to acknowledge the receipt of your letter of the 25th instant. You may insert for a period of three months in the *Ulster Gazette* the inclosed prospectus as abridged, provided you are willing to accept payment of your account in fully paid-up shares of the company.

"The inclosed advertisements may also be inserted at the same time, provided that you are willing to accept them."

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(1) Law Rep. 8 Ch. 270.

(2) Law Rep. 8 Ch. 407.

(3) 10 Ch. D. 720.

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No answer from Mr. *White* was put in evidence, but he inserted the prospectus and other advertisements in his newspaper during the period between the 8th of April and the 1st of July, 1876.

On the 1st of July, 1876, he sent to the company an account shewing the sum of £25 8*s.* 8*d.* as due to him for the advertisements issued to that date. The account was as follows:—

" 1876.		£	*s.*	*d.*
July, 1.	To advertising prospectus from April 8, 13 insertions	21	0	0
"	Last issue of shares at par from ditto, 13 insertions	4	8	8
		£25	8	8."

The company accepted the statement of account, and on the 16th of August, 1876, issued to him as fully paid up six shares of £5 each, entering these shares in their register as fully paid up. On the same day the company sent him the certificates in a letter containing the following passage:—

" Herewith is certificate for six fully paid-up shares. Kindly carry the balance to next account, and please return us your account duly receipted. You may insert for a further period of three months the inclosed prospectus as abridged, and the ccompanying statement on the same terms as before, that is, payment of your account to be made in fully paid-up shares of the company."

Mr. *White* thereupon returned his account receipted thus:—‘Paid in scrip.—*T. White.*"

The following entry appeared in the company's cash book:—

" By advertising accounts as per contract with various newspapers on the conditions agreed with the various proprietors, *i.e.*, that they invest the amounts of their accounts in fully paid-up shares of the company . .	£18,216 12*s.* 4*d.*"

This sum included £30 in respect of the shares issued to Mr. *White.*

This contract with Mr. *White* was never filed with the Registrar of Joint Stock Companies pursuant to sect. 25 of the *Companies Act*, 1867.

Similar letters were sent to Mr. *White* arranging for the insertion of further advertisements, which were duly inserted, and his claim in respect of them amounted to £45, but no shares were issued to him except the above-mentioned shares.

A resolution for the winding-up of the company was passed on the 8th of November, 1877, and the liquidator having placed Mr. *White* on the list of contributories for the six shares, Mr. *White* took out a summons, in which he claimed that, five of these six shares having been allotted to him in respect of work and labour done and completed for the company at the date of the issue thereof, such shares were to be treated as fully paid-up shares; but that if the Court should be of opinion that the contract with him ought to be registered, then that the allotment might be cancelled and the register rectified in order that the contract might be registered and the shares re-issued to him as paid-up shares. And he also claimed to rank as a creditor for £45 in respect of the subsequent advertisements inserted; and if he should be fixed on the list of contributories for five shares, he claimed damages against the company for the non-issue of five fully paid-up shares to him.

The Vice-Chancellor held that as the services contracted for had been actually performed before the shares were issued, there was at the date of the allotment a money debt payable by the company to Mr. *White*, and that the shares ought to be treated as shares paid up in cash within the principle of *Spargo's Case* (1). And his Lordship also held that he was entitled to prove as a creditor for the amount of the subsequent advertisements.

From this decision, so far as it related to the five paid-up shares, the liquidator appealed.

Hastings, Q.C., and *J. Cutler*, for the Appellants:—

The company never came under any liability to pay money to Mr. *White*. The contract with him was that he was not to be paid in cash but in shares. The only action which Mr. *White* could have had against the company would have been for damages

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(1) Law Rep. 8 Ch. 407.

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for not allotting him paid-up shares. Therefore the case does not come within the authority of *Spargo's Case* (1), where there was a money debt due from the company, but falls directly under the 25th section of the *Companies Act*, 1867. The contract with Mr. *White* was a good binding contract, and if it had been registered under the Act the allotment of shares would have been perfectly good. *Pagin & Gill's Case* (2) and *Andress' Case* (3) are distinctly in our favour.

Eddis, Q.C., and *E. C. Willis*, for Mr. *White*:—

This case is distinguishable from *Pagin & Gill's Case* and *Andress' Case*, inasmuch as here the services had been rendered to the company before the shares were allotted. The true construction of the contract is that the company should have an option to pay for the advertisements in paid-up shares. When the account was sent in for a definite sum of money and accepted by the company there was a money obligation, which might be either discharged in cash or in shares. It would have been a useless formality for the company to pay money and then receive it back for shares. The case is within the principle of *Spargo's Case*. If Mr. *White* had been sued for calls on his shares he might have pleaded payment: *Fothergill's Case* (4). The present case is not within the mischief intended to be remedied by the 25th section of the *Companies Act*, 1867, for the company had received the full value for the shares.

James, L.J.:—

I find it impossible to sustain the judgment of the Vice-Chancellor in this case. I should have been glad to sustain this contract, which seems to be a very honest contract and not intended in the way of any fraud on any person, and which, as far as I can judge from the accounts of the company, is a contract which has been made by a great many other persons throughout this country, who will be affected by this decision. But still we cannot construe this with reference either to the Act of Parliament or to the mischief which the Act of Parliament intended to provide against. We have got, first of all, to construe the contract, and then to see what the Act of Parliament says. Now, construing this as an ordinary contract, irrespective of any special consequences provided in certain cases as to which there is a statutory provision, trying it in every possible way, and, having turned it over in my own mind, it appears to me that what it really means is this: "If you are willing to insert the advertisements for three months, you may do it, but you must not, under any circumstances, apply to us for cash for those advertisements." It was a bargain to this effect: "You shall do the work, and we will give you shares in our company for it." It never was intended by either party, according to my view, to be a bargain resulting in a money demand upon a *quantum meruit,* or upon the usual scale of charges for advertisements. It was intended to prevent that, as it seems to me, and that is made clearer, if anything, by the next clause: "The inclosed advertisements may also be inserted on the same terms, provided that you are willing to accept them, that is, payment of your account to be made in fully paid-up shares."

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(1) Law Rep. 8 Ch. 407.

(2) 6 Ch. D. 681.

(3) 8 Ch. D. 126.

(4) Law Rep. 8 Ch. 270.

Then that being the true construction of that agreement, the company never did become liable to any money demand whatever on the part of Mr. *White,* and if the company never did become liable to a money demand on the part of Mr. *White,* the whole foundation of the argument that this is like *Spargo's Case* (1) fails. All that was said in *Spargo's Case* was that it was not, under the Act of Parliament, absolutely necessary that bank notes or sovereigns should pass and repass from one party to the other; that was not a reasonable interpretation to be put on the Act of Parliament, when it speaks of "payment in cash;" and that payment in cash meant what was payment in point of law, and that what would sustain a plea of payment in point of law was payment in cash within the meaning of the Act. Therefore it must be shewn that it would sustain a plea of payment. Here there was nothing to pay. If there could be no money demand, there never was anything to pay. The bargain was that Mr. *White* should accept payment in shares, and must not look for cash. Therefore there never was that money demand which was capable of being, I do

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(1) Law Rep. 8 Ch. 407.

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not say set off in the ordinary legal sense, but set off by the parties meeting and agreeing to put debt against debt.

That being so, it seems to me utterly impossible to bring the case within *Spargo's Case* (1), and consequently the case fails.

BRETT, L.J.:—

In this case Mr. *White* is the holder of certain shares in a company that is being wound up. Those shares were delivered to him and accepted by him upon the footing that they were to be treated as between him and those who gave them to him as paid up shares. But the Act of Parliament says that notwithstanding they were so delivered and so accepted, they are to be deemed to be payable in cash by him, and therefore he cannot escape the liability of paying for them now in cash unless he has already paid for them in cash, or, according to *Spargo's Case*, by a transaction which is equivalent in point of law to payment in cash. The whole question here seems to me to be whether this case can be brought within *Spargo's Case*. It signifies not whether it is like any other case in which the parties have been held liable to pay. If he is not within *Spargo's Case*, he is within the Act of Parliament, and the Act of Parliament says he must pay cash.

Now he has not actually paid for these shares in cash. He did not take any money out of his pocket in cash and pay for these shares. The only question, therefore, is whether there has been a transaction which is equivalent to a payment in cash in point of law. That was the decision of both the learned Judges in *Spargo's Case*. I will not read again the judgment of Lord Justice *James*, every word of which seems to me to be absolutely correct, but which is not meant for an interpretation of the Act of Parliament. It is a mode of satisfying that which is required by the Act of Parliament, namely, a payment in cash, or something which is in law equivalent to it. Now Lord Justice *Mellish* says (2) that in *Fothergill's Case* (3) he stated his opinion that "if the circumstances relied on would in an action for the money due upon shares be evidence only in support of a plea of accord and satisfaction, the section would prevent their being a good defence;

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(1) Law Rep. 407.

(2) Law Rep. 8 Ch. 414.

(3) Law Rep. 8 Ch. 270.

but that if they would support a plea of payment, then the 25th section did not prevent their being a good defence." Now the difference between a plea of accord and satisfaction, or a plea of set-off and a plea of payment, was a thing as familiar as could be to Lord Justice *Mellish*, and what both the learned Judges determined was that the transaction must be one which would support a plea of payment. Then Lord Justice *Mellish* goes on to shew what circumstances, and what circumstances alone, will support a plea of payment when there has not been an actual payment in cash. He says, "Nothing is clearer than that, if parties account with each other, and sums"—that is, of money—"are stated to be due on one side, and sums"—that is, of money—"to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid." There obviously he speaks of money, and money only, and he goes on and shews it more clearly. "Indeed it is a general rule of law that in every case where a transaction resolves itself into paying money by *A.* to *B.*, and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards." In order to prove a plea of payment when there has been no payment in money, you must bring the transaction within these two propositions. There must be money due from the one to the other on both sides, and the parties must agree to set one demand of money against the other demand of money. Unless you can bring the transaction within those terms, there is no payment which is equivalent to a payment in cash, or which would prove a plea of payment.

Now, therefore, the question here is no longer upon what is the construction of the Act of Parliament. The question is whether at the moment of the alleged payment here, inasmuch as there was not a payment in cash, there was a transaction such as is described in that judgment. There was money due to the company on the shares at that moment by virtue of the Act of Parliament, although that was not the bargain between the parties as to the paid-up shares. Well, if there was at that moment money due from the company to *White*, and then they did at that moment agree to set one against the other, there was a transaction which was equivalent to payment, and which would have been proof of payment, but if at that moment there was no money due to *White*, although there was something else due to him, then the case is not brought within the rule.

Now what was it that was due to *White* at that moment? That depends upon what is the construction of the agreement between *White* and the company as to what *White* was to have in respect of the services rendered by him. The contract between *White* and the company unfortunately is not a contract entirely in writing. It is a contract partly in writing and partly constituted by the acts of *White*. The letter from the company to *White* was a proposal which *White* might have accepted or not at his pleasure. We must construe that proposal, not according to any strictly grammatical construction, but according to the business construction of it, and what, as a matter of business, is the clear intention of it. Now what is it? "You may insert for a period of three months in the *Ulster Gazette* the inclosed prospectus as abridged, provided that you are willing to accept payment of your account in fully paid-up shares of the company." It seems to me that the proper, ordinary, and clear construction of that is, You may insert for a period of three months, if you are willing to agree to accept payment of your account in fully paid-up shares. Then by acting upon that proposal, without making any condition with reference to it, he accepts it in its terms as it was intended by those who made it, and if he did so the contract between him and them is a contract according to the terms of the proposal as it was intended by the company. Now is that really a proposal that he should do the work for a cash payment; or is it a proposal that he was never to ask for money, but should only be paid in shares? The difference to my mind is obvious. If he was only to be paid in shares, then, if the shares went down, nevertheless he was bound to accept payment in shares, and he would not get a payment which was equivalent to what he would get if they were to pay him in cash. If this was an agreement that he should be paid in shares, it was a reciprocal agreement, and he would be entitled to insist upon shares if the value of the shares went up. Upon no fair construction can I find that there was

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any other than an agreement that he should be paid in shares, and shares only, and if so, for a breach of the agreement on the part of the company the action would not be for a money demand at all, the action would be for a breach of the agreement to deliver shares, and on a non-delivery of shares the damages would be the value of the shares. Therefore, although there was money due to the company, there was no money due to *White*, and consequently, even though they assumed to set off his demand or right of action against the money which was due from him to the company, that was not a transaction which was equivalent to payment, or which could have proved a plea of payment. The case is not within *Spargo's Case* (1), and if it is not within *Spargo's Case*, I am sorry to say that, in my opinion, Mr. *White* was liable for these calls.

COTTON, L.J.:—

I am unable in this case to agree with the decision at which the Vice-Chancellor arrived. Of course it is obvious that the contract was entered into with perfect *bona fides*, but the question is, what is the law applicable to such a case. Now here we have on the list of shareholders Mr. *White's* name, with six shares standing in his name, and they are entered as fully paid up by him to the company; but they were entered in his name as fully paid-up shares in consequence of an agreement with the company, which I shall presently have to consider, that agreement never having been registered. The words of the 25th section of the *Companies Act*, 1867, in such a case are plain, "That every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash," unless the agreement under which they have been issued shall have been registered. All that the decisions amount to is this, that when under such circumstances, that is to say, when there are fully paid-up shares in the name of a man put there in pursuance of an agreement, it shall be considered that the Act of Parliament is satisfied if at the time there was money due by the company to the shareholder

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(1) Law Rep. 8 Ch. 407.

which could be satisfied by the calls due on the shares, and that there was an agreement in effect that it should be so satisfied. That was merely allowing substance to prevail over form, that is to say, that it should not be necessary in such a case for the company to pay their debt to the shareholder, and for the shareholder to pay his debt to the company, either by giving money one to the other, or by the company handing over a cheque to the shareholder and his handing it back again. In the present case we must deal with it as a matter of substance, and see, without reference to what the effect will be under the Act of Parliament, what in substance was the real contract and agreement between *White* and the company; the only point which is material being this, whether or no under that contract any money ever became due by the company to *White*. I think if one looks at this agreement without critically scanning the words of it, it is perfectly clear that the company never would have agreed to employ *White* except on this condition, that he was to have nothing from the company except fully paid-up shares, that is to say, the company, wishing to start itself, said to him in substance, "If you will take fully paid-up shares, shares on which you are to be subject to no call, you shall advertise for us, the shares being given to you in consideration of your doing that work."

But it is said that that is not the true construction, and that what the company did was to employ him on the usual terms for the purpose of advertising this company, with an option on their part to give him payment in shares. Now, for that purpose I need not read this letter which has been so often read before, but the part relied upon was, "Provided you are willing to accept payment of your account in fully paid-up shares of the company." In my opinion, when *White* accepted the offer which this letter makes to him on behalf of the company, it was no longer an option offered on their part, but he bound himself to accept, as the company were also bound to give, shares, in consideration of his doing the work.

Then there is another matter which has been referred to, and at first sight I was rather struck by it. The letter says, "In payment of your account," and an account was sent in pursuance of that, and an account was no doubt made out, and *primâ facie* it will be said it was a money account. But how and why was that necessary? It was for the purpose of ascertaining what quantity of fully paid-up shares should be allotted to *White* in the company. It was not, in my opinion, referred to in the letter or in the subsequent dealings as recognising the liability on behalf of the company to pay cash, but it was merely for the purpose of ascertaining the quantum, as a measure of the number of shares that were to be allotted to this gentleman as fully paid-up shares. Therefore there is no debt by the company in money, payment of which can be considered to have taken place by this gentleman retaining the amount due on the shares. That being so, he has not paid for them in cash. The shares were to be taken as issued and allotted to him subject to the burden of being paid up in cash. He has not discharged that burden, and therefore he remains liable.

That, of course, disposes of the whole matter. If there was no money liability of the company in respect of these advertisements he cannot proceed against the company for the £45, but he must make such a claim as he can in respect of damages for the non-compliance by the company with the contract into which they entered.

Then I shall advert to what seems to me to have been the reasoning of the Vice-Chancellor in his judgment. As far as I can see he construed this as a contract, the only rational interpretation he could give to which was that the company were to be liable in cash, but that the cash for the calls on the shares should be retained in payment of their cash liability to the shareholder, because that was the only way in which such contract legally could be given effect to. I do not think it right to construe such a contract with reference to the liability which will follow from that construction. But in my opinion that is answered by the fact that at the time the contract was entered into it was perfectly competent for it to be carried into execution so as to give effect to its fair and *primâ facie* meaning; because if that contract had then been registered the shares could have been effectually issued to this gentleman as shares on which he never would be liable to be called on to pay any money.

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JAMES, L.J.:—

The order will be discharged as to those shares without prejudice to any question whether Mr. *White* is entitled to any damages against the company.

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Solicitors: *J. S. Salaman; C. M. Elborough.*

Considered. *In re* DULLES SETTLEMENT [1951] 1 Ch. 265

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July 31; *Aug.* 1.

Ex parte BLAIN. *In re* SAWERS.

Court of Bankruptcy—Jurisdiction—Foreigner resident abroad but trading in England—Execution levied on Goods in England—Act of Bankruptcy—Construction of English Statute—Bankruptcy Act, 1869 (32 *&* 33 *Vict.* c. 71), *ss.* 6, 8—*Rules of Court,* 1875, *Order* IX., *r.* 6; *Order* XVI., *r.* 10; *Order* XLII., *r.* 8.

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The English Court of Bankruptcy has no jurisdiction to make an adjudication of bankruptcy against a foreigner, domiciled and resident abroad, who has never been in *England,* even though he is a member of an English firm which has traded and contracted debts in *England,* and against which an execution in respect of a judgment debt above £50 has been levied by seizure and sale of goods of the firm in *England.* And in such a case the Court ought not to make an order for service out of the jurisdiction of a bankruptcy petition on the foreigner.

An act of bankruptcy must be a personal act or default, and it cannot be committed through an agent, nor by a firm as such.

Primâ facie an English statute affects only English subjects or foreigners who come, either permanently or temporarily, within the allegiance of the English Crown.

Quære, whether in all cases it is competent to sue a firm under Rules of Court, 1875, Order XVI., rule 10.

THIS was an appeal from a decision of Mr. Register *Pepys,* acting as Chief Judge in Bankruptcy.

James Sawers, of *Liverpool,* and six other persons, traded at *Liverpool* and in *London* under the firm of *James Sawers & Co.,* and at *Valparaiso* and other places in *South America* under the firm of *Sawers, Woodgate, & Co.* The principal place of business of the firm in *England* was at *Liverpool.* Two of the partners were Chilian subjects, domiciled and permanently resident in *Chili,* and they had never been in *England* or in any part of *Great Britain.*

On the 16th of December, 1878, *William Blain* commenced an action in the Queen's Bench Division against the firm of *James Sawers & Co.*, in respect of a debt of £2500 contracted by the firm in *England*. The writ was served the same day on *James Sawers* personally, at the place of business of the firm in *Liverpool*. It was not served on any of the other partners. On the 24th of January, 1879, the Defendants not having appeared to the writ, judgment for £2500 and costs was entered for the Plaintiff against the Defendant firm. A writ of *fi. fa.* was issued upon the judgment, under which the sheriff seized goods of the firm at *Liverpool* and sold them on the 29th of January, 1879. On the same day the Plaintiff presented a bankruptcy petition in the *London* Court against all the members of the firm of *James Sawers & Co.*, alleging that the levy of the execution by seizure and sale was an act of bankruptcy committed by them. An *ex parte* order was made, under rule 66 of the Bankruptcy Rules, 1870, giving the petitioning creditor leave to serve the petition on the two Chilian partners in *Chili*. Before the hearing of the petition as against them they appeared under protest, not submitting to the jurisdiction of the Court, and asked that the order for service might be discharged, on the ground that the Court had no jurisdiction over them. The Registrar discharged the order. The petitioning creditor appealed.

De Gex, Q.C., *Cohen*, Q.C., and *Yate Lee*, for the Appellant:—

The Respondents come within the words of the *Bankruptcy Act*; they are debtors within the meaning of sections 6 and 8 of the Act, and there is no reason why the English Court of Bankruptcy should not have jurisdiction over them. The debt was contracted in *England*, the cause of action arose entirely here. There is property of the firm in *England*, and the firm has traded here. Bankruptcy is merely a process against the bankrupt's property. By Rules of Court, 1875, Order XVI., rule 10, partners may now be sued in the name of the firm, and under Order IX., rule 6, service of a writ on one partner is good service on the firm, and by Order XLII., rule 8, where a judgment is against partners in the name of the firm, execution may issue against any property of the partners as such; against any person who has admitted on the pleadings that he is, or has been adjudged to be, a partner; and against any person who has been served with the writ, as a partner, and has failed to appear. In *Ex parte Crispin* (1), it was held that a foreigner domiciled abroad, who contracts debts in *England* and commits an act of bankruptcy in *England*, is liable to an adjudication of bankruptcy in *England*, although he has left *England* before the petition is presented. Here an act of bankruptcy has been committed in *England* by suffering the goods of the firm to be seized and sold in *England*. A passive act of bankruptcy (so to speak) like this may be committed through an agent; indeed the act may be considered the act of the firm. Rule 1 of the Bankruptcy Rules, 1870, defines the word "debtor" as including a firm of debtors in partnership. Here the execution is against the firm, and they have committed an act of bankruptcy by failing to pay the debt. Under the provisions of sects. 18 and 19 of the *Common Law Procedure Act*, 1852 (15 & 16 Vict. c. 76), if an action was brought on an English contract, whether entered into personally or through an agent, the writ could be served on a foreigner abroad without any leave of the Court. A single creditor could then under a judgment seize all the debtor's property in *England*, and the other creditors would get nothing. This is equally so under the Judicature Acts. The very object of the *Bankruptcy Act* is to prevent a single creditor from thus obtaining a preference. The joint assets will not be protected unless all the partners are adjudged bankrupts. There is no violation of international law or comity in making a foreigner a bankrupt, if the Court only assumes to deal with property situate in *England*.

In *Ex parte Crispin*, the Court did not consider international law at all. There is nothing inconsistent with international comity in giving notice to a foreigner who has never been in *England*, but has contracted debts here, that, if he does not pay those debts, the English Court of Bankruptcy will distribute his property which is in *England* equally among his creditors.

The circumstance of a trader being a foreigner makes no difference: *Cooke's* Bankrupt Laws (2). No doubt, the act of bankruptcy must be committed in *England*, but an act of bankruptcy is not a criminal act; it is a mere test of insolvency, and it may be committed through an agent. Suppose an English trader happened to be abroad, and the manager of his business during his absence allowed an execution to be levied on his goods; would he not have committed an act of bankruptcy? And it could not be said to be a personal default of his. Why should not that apply equally to a foreigner who has never been in *England*, but who has traded here?

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(1) Law Rep. 8 Ch. 374.

(2) 8th Ed. vol. i. p. 81.

[JAMES, L.J.:—There is no such thing as a limited act of bankruptcy. If only the property of the bankrupt which is in *England* would be affected, it would be another matter.]

The authorities shew that the English Bankruptcy Court can only deal with that property of a foreigner which is within Her Majesty's dominions. If the Court cannot exercise the whole of its jurisdiction, why should it not exercise a part? The real test is, where is the property situate? Here, by virtue of the *Judicature Act*, the judgment is against the firm, and the property of the firm has been taken in execution. The firm have committed an act of bankruptcy. The words of the *Bankruptcy Act* literally apply to the case. What principle of municipal or international law compels an exception to be made?

At any rate, the objection is taken prematurely. We have merely obtained leave to notify certain proceedings to foreigners who have never been in *England*. This cannot be a violation of any international comity. They may choose to appear on the hearing of the petition and submit to the jurisdiction, or they can take the objection then.

Benjamin, Q.C., *Winslow*, Q.C., and *Everitt*, for the Respondents, were not heard.

JAMES, L.J.:—

It appears to me that the Registrar's order was perfectly right. The Respondents come here under protest, as they have a perfect right to do, to discharge an order which was made in this country, by a Court of this country, on the ground that it is an order which improperly emanated, and they ask to have the order discharged, so that they may never be embarrassed, or be liable to be embarrassed, by the fact of such an order having been issued.

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It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. Every foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the Sovereign, entitled to the protection of the Sovereign and subject to all the laws of the Sovereign. But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English Legislature could have ever intended to make such a man subject to particular English legislation. English legislation has said that, if a debtor allows his goods to be taken in execution, certain consequences shall follow, and English legislation has a right to say that with regard to an English subject. But what right has it to say so with regard to a Chilian? No doubt it has a right to say to a Chilian, or to any other foreigner, "If you make a contract in *England*, or commit a breach of a contract in *England*, under a particular Act of Parliament a particular procedure may be taken by which we can effectually try the question of that contract, or that breach, and give execution against any property of yours in this country." But that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognised abroad remains to be considered, and must be determined by the tribunals abroad. If a foreigner, being served with a writ under the provisions of the *Judicature Act*, did not choose to appear, and the Legislature said, "If you do not appear you will commit a default in that way, and we will give judgment against you," whether that judgment would, under such circumstances, be recognised by foreign tribunals, as being consistent with international law and the general principles of justice, is a matter which must be determined by them. But we have to consider a matter, not of British, but of peculiarly English legislation, because the *Bankruptcy Act* is confined to *England*, and does not extend to *Scotland* or *Ireland*, except in certain cases expressly provided for, and I believe it does not extend to the colonies. And we have to deal with the case of a Chilian who says, "I am a Chilian, and I wish to be a Chilian; I have never made myself subject to English legislation or English tribunals. I do not wish to come here to be made a bankrupt." It seems to me he has a right to say that. As I happen to know, there is in the *Sandwich Islands* a code of bankruptcy, which was introduced by *Kamehameha* II., and I think it would be monstrous if an English merchant of *Liverpool*, having business transactions in the *Sandwich Islands*, was summoned by the Court there to appear in a bankruptcy proceeding at *Honolulu*. It is not consistent with ordinary principles of justice or the comity of nations that the Legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their jurisdiction. Of course, if a foreigner has come into this country and has committed an act of bankruptcy here, he is liable to the consequences of what he has done here; but, in the absence of express legislative provision, compelling me to say that the Legislature has done that which, in my opinion, would be a violation of international law, I respectfully decline to hold that it has done anything of the kind.

I therefore entirely agree with the decision of the Registrar, that the order for service ought to be discharged. The other ground on which he put his decision would, I think, be sufficient, namely, that the whole of the provisions of the *Bankruptcy Act* with regard to acts of bankruptcy proceed on the commission of some act or default by the debtor. Sect. 6 begins with saying that the following "acts or defaults" are to be included under the expression "acts of bankruptcy," and the Registrar was of opinion that it would be impossible to say that these Chilian subjects had been guilty of any default. I do not at all differ from him in that conclusion.

BRETT, L.J.:—

In this case the English Court of Bankruptcy has made an order that notice of a bankruptcy petition should be served on Chilian subjects abroad, and those Chilian subjects have appeared here under protest and have taken the objection that the English Court of Bankruptcy had no jurisdiction to make such an order as against them. If the English Court of Bankruptcy has no jurisdiction at all over these Chilian subjects, it follows that it has no jurisdiction to make the order for service of the petition.

It is said that the case is literally within the words of the statute, and so, no doubt, it is. But does it follow that, because a case is literally within the words of a statute of any country, therefore it is within the jurisdiction of the Courts of that country? Certainly not. The governing principle is that all legislation is *primâ facie* territorial, that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who for the time bring themselves within the allegiance of the legislating power. The English Legislature has a right to make a bankruptcy statute which shall bind all its own subjects, and any foreigner who for the time is in *England* and does something there which the statute forbids. As long as he is in *England* he is under the allegiance of the Queen of *England*, and in the power of the English Legislature. Therefore it has been held that if a foreigner, though not domiciled or permanently resident in this country, comes into *England*, and does or omits to do some act in *England* which the English Legislature has declared to be an act of bankruptcy, then, by reason of that act of bankruptcy done or suffered in *England*, he may be made a bankrupt in *England*. But, upon the ground of the limited power of the Legislature of *England* to legislate, all the authorities have held that it is necessary that the act of bankruptcy should have been committed in *England*, if the person against whom the statute is invoked is a foreigner who is not domiciled in *England*.

Mr. *Cohen* admits that the act of bankruptcy must be committed in *England*, but he says that in this case there was an act of bankruptcy committed in *England*. That on which he relies is this—that the firm, of which these Chilian subjects are members, trades in *England*, and that an action was brought against the firm, and, under the authority of the Judicature Rules, the writ was served upon one member of the firm in *England*, and that thereupon an action ensued, and was carried through, and judgment was obtained against the firm, upon which execution was levied by seizure and sale of the goods of the firm in *England*, and that he says, by the English bankruptcy law, is an act of bankruptcy. He says it is an act of bankruptcy by the firm. He is met and challenged by being asked whether a firm as such can commit an act of bankruptcy. He assumes that it can. I beg leave to doubt it. Nay, more, I am of opinion that a firm as such cannot commit an act of bankruptcy. An act of bankruptcy must be the personal act or the personal default of the person who is to be made a bankrupt.

Then it was said that, by virtue of the *Judicature Act*, service upon the firm is service of the writ on these foreigners. For the purposes of the judgment, and under the *Judicature Act*, that may possibly be so. But does it follow that, because that is so under the *Judicature Act*, it gives a larger jurisdiction under the *Bankruptcy Act?* Certainly not, as it seems to me.

It was said that a person may commit an act of bankruptcy by his agent, and that the partner in *England* was the agent of these foreign partners, and therefore they committed an act of bankruptcy by their agent in *England*, that is, by allowing the execution to go without satisfying the judgment, and that, this having been done by their agent in *England*, they ought to be adjudged bankrupts. That assumes that a man can commit an act of bankruptcy by his agent, whether he has authorized the particular act or not, and that assumption seems to me to be equally wrong. I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he has had no cognizance. In truth, the argument comes to this; it would be admitted that, at the time of the passing of the *Bankruptcy Act*, and up to the passing of the *Judicature Act*, this would not have been an act of bankruptcy by these Chilians, but it is said that the *Judicature Act*, which is an act of mere procedure, has, by enactments as to procedure, extended the jurisdiction under the *Bankruptcy Act*, so as to reach foreigners who would not otherwise be subject to the English bankruptcy law. That, as it seems to me, is a view of legislation which is wholly untenable. I think the case comes within the well-recognised rule, and that the Respondents cannot be made subject to the English *Bankruptcy Act*, being foreigners not domiciled here and not present in this country; that they could not be made subject to the English bankruptcy law unless they had committed an act of bankruptcy in *England*. It is the act of bankruptcy which gives the Bankruptcy Court jurisdiction, and, unless that act be committed in *England*, if the debtor is a foreigner and not domiciled in *England*, the English Court has no jurisdiction over him. Therefore the Bankruptcy Court had no jurisdiction over the Respondents, and no jurisdiction to make the order for service, and that order was properly set aside.

COTTON, L.J.:—

It has been contended that even although we should hold that, on the true construction of the Act, there is no jurisdiction to make an order of adjudication against the Respondents, yet we ought to discharge the Registrar's order, which discharged the previous order for service out of the jurisdiction, the service being a mere notice, and that we ought to let the matter go to a further stage, for the purpose of allowing the Court hereafter to decide whether or no there is jurisdiction to make an adjudication. In my opinion that would be quite wrong. The persons against whom the order for service has been made appear here under protest, and they ask that the order for service on them out of the jurisdiction may be discharged, thus raising at once the question of jurisdiction, and declining to litigate any matter in the Court of Bankruptcy. In my opinion, if the Court of Bankruptcy has no jurisdiction, it is its duty at once to discharge the order and not to say that it will give the parties an opportunity of coming here and meeting the case, and saying, if they like, that the order for service was a mistake. In my opinion they have a right to come here at once and raise the question of jurisdiction. If the Court thinks there is no jurisdiction, it ought not to sanction the bringing of persons before it, on a petition under which it has no jurisdiction to make an order for adjudication.

Now we come to the question whether against the Respondents there is any jurisdiction under the *Bankruptcy Act*. They are foreign subjects, and they have never been in *England*. The question, to my mind, comes to the simple one whether or no they are debtors within the meaning of the 6th section of the *Bankruptcy Act*. That section provides that a creditor may present a petition praying that the debtor be adjudged a bankrupt, and the Court may make the adjudication if the debtor has done, or has suffered some of the various things mentioned in the sub-sections of that section, or, to put it more correctly, if, as regards the debtor, some one of the things mentioned in the sub-sections has happened. When we look at those sub-sections, I think it must be obvious, notwithstanding the argument of Mr. *Cohen*, that the word "debtor" must receive some qualification, because we find in the second sub-section "That the debtor has, in *England* or elsewhere, made a fraudulent conveyance or transfer of his property." The act there specified as giving the Court a right to adjudicate the person doing it a bankrupt, may have been done, not only in *England*, but elsewhere, and, unless we put some limit on the word "debtor," it will come to this, that any man who has never been in *England*, a subject of a foreign state, can be made a bankrupt in *England*, because in a foreign state he has done a certain act. The argument of Mr. *Cohen* did not go to that extent, but that is its logical result.

Let us see what the case is. We are not dealing with the question which might arise if an English Act of Parliament had expressly said that, as against a Chilian subject, or any other alien who had never been in *England*, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be the duty of the Court, acting in the execution of the English Act of Parliament, whatever the consequences might be, and however foreign nations might object, to say, This is the English statute, and we must act on it, and the question which you, a foreigner, raise, we are bound to disregard. I do not say that would be so, because, if the Act had clearly gone beyond the power of the English Legislature, there might be a question. But that is not so here. All we have to do is to interpret an Act of Parliament which uses a general word, and we have to say how that word is to be limited, when of necessity there must be some limitation. I take it the limitation is this, that all laws of the English Parliament must be territorial—territorial in this sense, that they apply to and bind all subjects of the

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Crown who come within the fair interpretation of them, and also all aliens who come to this country, and who, during the time they are here, do any act which, on a fair interpretation of the statute as regards them, comes within its provisions. Of course it is not necessary that a person to be subject to an English Act should be domiciled here. If he is resident here temporarily, and does an act which comes within the intent and purview of a statute, he, as regards that statute, as does every alien who comes here in regard to all the laws of this realm, submits himself to the law, and must be dealt with accordingly. As regards an Englishman, a subject of the British Crown, it is not necessary that he should be here, if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act by reason of his being a British subject, though, of course, in the case of a British subject not resident here, it may be a question on the construction of the Act of Parliament whether that which, if he had been resident here, would have brought him within the Act, has that effect when he is not resident here. As regards a British subject, whether he is here or not, he can be made bankrupt, if the Act of Parliament has declared that, in the events which have happened, he can be made bankrupt. But, as regards foreigners, there is *primâ facie* no right to bind them if they are not here. I think, therefore, that the true interpretation of the general word "debtor" in the *Bankruptcy Act* is, a debtor subject to the English bankruptcy law. I say to the English bankruptcy law, and not to the English law generally, for this reason, that we are dealing with a question of bankruptcy; and it may be that there are English statutes which give our Courts power to deal with foreigners who are not here as regards matters which, according to all principles, ought to be adjudicated upon by our Courts, such as, for instance, questions relating to real property situate in *England*. Of course it is right that questions of title to such property should be adjudicated upon here, and there may well be English statutes giving our Courts power to deal with suits relating to the title to real property in *England* as regards aliens, and for the purpose of serving them. But that is a very different thing from saying that you shall deal with a foreigner who has never been here, and has never submitted himself to the English Act of

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Parliament, in the special subject of bankruptcy to which this Act refers. In my opinion, we are not justified in giving the interpretation which we are asked to give to the word "debtor," simply because some convenience would result from so doing, or some inconvenience may result from not doing so. We have to consider what is the fair interpretation of the Act, and we must not give to general words an interpretation which would, in my opinion, violate the principles of law admitted and recognised in all countries.

James, L.J. :—

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The appeal will be dismissed with costs. I cannot help thinking that some difficulty may arise with regard to that provision of the Judicature Rules which enables partners to be sued in the name of the firm, because we have not yet introduced into our law the notion that a firm is a *persona*. What I mean is this, supposing there to have been an entire change in the constitution of the firm, and that, although the name of the firm continued, the firm at the time when the action was brought consisted of entirely different persons from those of whom it consisted at the time when the contract was made; for instance, if *A.*, *B.*, and *C.* were the partners at the time of the action, and *E.*, *F.*, and *G.* at the time of the contract.

Brett, L.J. :—

I quite agree; it may be that under such circumstances you could not sue the firm.

Solicitors for Appellants: *Gregory, Rowcliffes, & Rawle*, agents for *Hill & Dickinson, Liverpool.*

Solicitors for Respondents: *Clarkes, Rawlins, & Clarke.*

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24 Ch D 728

BARBER *v.* MACKRELL.

[1867 B. 117.]

Practice—Adding to Accounts directed by Decree—Lapse of Time—Fraud—Rules of Court, 1875, *Order* XXXIII.

In an action to administer the estate of a deceased solicitor, an administration decree, directing the usual accounts and inquiries, was made in April, 1867. In December, 1871, an order was made that, in addition to the accounts and inquiries directed by the decree, the ordinary accounts and inquiries should be taken and made of and relating to the partnership dealings and transactions between the testator and his former partners who consented to be bound. Before this order was made the partners had claimed to be creditors on the estate for a large amount, and had filed affidavits alleging that the testator had fraudulently misappropriated moneys belonging to the partnership. In February, 1879, the then surviving partner applied by summons that an additional account might be taken of the amount in which the testator's estate was indebted to the applicant for partnership moneys fraudulently retained or improperly applied by the testator, and of the interest which ought to be allowed on taking the account:—

Held (affirming the decision of *Fry*, J.), that the Court had jurisdiction to add the account asked for, and that under the circumstances it ought to be added; but the Court added a direction that the Chief Clerk should at the instance and at the risk, as to costs, of the Defendant certify any circumstances shewing that the surviving partner participated in the moneys fraudulently withdrawn or retained by the testator.

Whether, under the order for the ordinary accounts and inquiries relating to the partnership dealings and transactions, the question of fraudulent withdrawal of moneys and the claim for interest thereon might not have been raised, *quære*.

Observations on *Job* v. *Job* (1) and *Mayer* v. *Murray* (2).

THIS was a suit commenced in 1867 for the administration of the real and personal estate of *W. T. Mackrell*, who died on the 14th of February, 1867. The Plaintiffs were his executors, and the Defendant was his widow and executrix. The testator was a solicitor, and had carried on business in partnership, first with one partner, and afterwards with two, the second partner being a son of the first. On the 27th of April, 1867, an administration decree was made which directed the ordinary accounts and inquiries. On the 1st of December, 1871, upon the application of the Defendant, and upon hearing the solicitors for the parties and for the two surviving partners, who claimed to be creditors against the estate of the testator, and they consenting to be bound by the order as if made parties to a suit with the like object, and the Judge being of opinion that it would be for the benefit of all parties interested in the testator's estate that, in addition to the accounts and inquiries directed by the decree, certain further accounts and inquiries should be taken and made, it was ordered that the ordinary partnership accounts should be taken as between the testator's estate and his partners in the two partnerships, and that the ordinary inquiries should be made.

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(1) 6 Ch. D. 562.

(2) 8 Ch. D. 424.

Before this order was made, an affidavit had been filed on the 22nd of December, 1868, by the elder surviving partner, in which he stated that the sum of £11,918 14*s.* 11*d.* was due to him from the estate of the testator on account of the partnership which had subsisted between him and the testator. On the 25th of October, 1871, he filed further affidavits, in which he said that the keeping of the general books and accounts of the partnership between him and the testator was entrusted to the testator, but he neglected to keep those books and accounts properly. He also said that the testator from time to time during the partnership drew for his own purposes large sums from the partnership moneys and caused the cashier of the partnership to make entries in the partnership books by which it would appear as if mortgages of clients which had been paid off were still subsisting. These proceedings were carried on without the knowledge of the deponent, and in breach of the terms and conditions of the partnership, and he had no knowledge or suspicion of what had been done until the partnership accounts had been recently made up and investigated. The result of that investigation shewed that the estate of the testator was indebted to the deponent, as the surviving partner of the original firm, in the sum of £42,276 18*s.* 2*d.*, and he claimed to be a creditor for that sum, and interest thereon from the time of the testator's death. There were further affidavits which stated the details of particular misappropriations alleged to have been made by the testator. Affidavits containing similar charges in relation to the second partnership were also filed.

In March, 1874, the then surviving partner of the two firms

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(the father) took the opinion of counsel, and was advised that he would not be entitled to claim interest on the amount found due to him from the testator on taking the partnership accounts, but must bring in a claim to rank as a specialty creditor in respect of the breaches of covenant in the partnership articles, and claim interest by way of damages. In December, 1876, the Chief Clerk made a certificate in which interest on some of the sums found due was allowed, but it was taken off the file by consent, for reasons not material to the present question.

On the 22nd of February, 1879, the surviving partner of the two firms took out a summons in the suit, asking that, in addition to the accounts and inquiries directed by the decree and the order of the 1st of December, 1871, the following further account might be taken, viz., "an account of all and every the sum and sums of money (if any) in which the said *William Thomas Mackrell* or his estate is indebted to the applicant, as surviving partner of the said respective firms as aforesaid, for all and every the sum or sums (if any) fraudulently retained by the said *William Thomas Mackrell,* or improperly applied by him, and of the interest (if any) which ought to be allowed on taking such account to the applicant, as such surviving partner of the said respective firms as aforesaid, on such sum and sums of money or any of them."

The hearing of the summons was adjourned into Court, and came on for hearing before Mr. Justice *Fry* on the 21st of June.

North, Q.C., and *J. T. Prior,* for the summons:—

A demand in the nature of unliquidated damages may be an item in a partnership account, and may be enforceable in equity only: *Bury* v. *Allen* (1). Sums fraudulently or improperly withdrawn by a partner will carry interest: *Cooke* v. *Benbow* (2). There is jurisdiction to add the account asked for, whether under the old practice of the Court of Chancery, Consolidated Orders, Order XXXV., rule 19, or under the new practice of the High Court, Rules of Court, 1875, Order XXXIII. An order charging an executor with wilful default can be made at any time on a proper case being made: *Job* v. *Job* (3); that is, as the Master of

(1) 1 Coll. 589, 604.

(2) 3 D. J. & S. 1.

(3) 6 Ch. D. 562.

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the Rolls explained in *Mayer* v. *Murray* (1), if wilful default is charged in the pleadings at any time before judgment. And in the present case, before the order of December, 1871, was made, evidence had been filed shewing a *primâ facie* case of fraud on the part of the testator. That order was not really a consent order; the application was made by the Defendant, and the testator's surviving partners merely consented to be bound as if a bill had been filed.

Higgins, Q.C., and *R. W. Ingham*, for the Defendant:—

The account asked for would be inconsistent with the decree and with the order of December, 1871, and cannot therefore be added: *Partington* v. *Reynolds* (2); *Nelson* v. *Booth* (3). Order XXXIII. has made no difference in the practice: *Mayer* v. *Murray* (4). If the decree and the order of December, 1871, had been differently framed, there would have been reciprocal accounts against the surviving partner, who may have profited by the transactions in question. Interest can only be given by way of damages: *Powdrell* v. *Jones* (5); *Lindley* on Partnership (6). The delay is a fatal objection to the application: *Knox* v. *Gye* (7). *Bury* v. *Allen* (8) is really in our favour; there the question had been raised, and was adjudicated on at the hearing. The fact that there have been unauthorized withdrawals of capital does not give jurisdiction to allow interest: *Cooke* v. *Benbow* (9). A case of fraud ought to be properly raised in the pleadings. An amendment for the purpose of raising a case of wilful default after judgment will not be allowed: *King* v. *Corke* (10). The question of fraud ought to be tried in an action. All that is now alleged was known to the surviving partners in 1871; and if the question had been then raised, evidence might have been forthcoming which is now lost. If this account is permitted, there ought to be an opportunity for the Defendant to shew, if she can, that the surviving partner participated in the moneys alleged to have been withdrawn by *Mackrell*.

(1) 8 Ch. D. 424, 426.
(2) 4 Drew. 253, 261. 4 Jur ns 260
(3) 3 De G. & J. 119. 5 Jur ns 28
(4) 8 Ch. D. 424.
(5) 2 Sm. & Giff. 305. 18 Jur 1048
(6) 4th Ed. 837.
(7) Law Rep. 5 H. L. 656.
(8) 1 Coll. 589.
(9) 3 D. J. & S. 1.
(10) 1 Ch. D. 57.

FRY, J.:—

Between April, 1867, when the administration decree was made, and 1871, affidavits were filed in the suit which shewed that there had been some very serious defalcations on the part of Mr. *Mackrell* towards his partners. The evidence bearing upon one matter has been before me now, and it certainly makes out a *primâ facie* case of fraudulent retainer by Mr. *Mackrell*. I say *primâ facie*, because, of course, notwithstanding the lapse of time, and the opportunity already given to meet that case, possibly some answer may yet be given to it. No answer has yet been given which appears to me worthy of consideration.

In that state of things the order of the 1st of December, 1871, was made. The present application is made after the lapse of more than seven years from the date of that order, and it asks to have an additional account directed:—and it appears to me that that account ought to be added. In the first place, bearing in mind the evidence which is before me, I think that complete justice will not be done between the parties unless such an account be taken, because it appears to me that under the order of the 1st of December, 1871, it will not be competent to deal with matters creating a right to unliquidated damages—matters of fraud—but only with strictly partnership matters, and inasmuch as there is evidence before me that there has been a fraudulent retainer, I think if it should turn out on further investigation that there was such a retainer, the full measure of relief, to which the surviving partner is entitled, would not be given if this account is not taken. There is therefore a *primâ facie* reason of the strongest nature why I should direct this account to be taken.

Several objections have been raised. First, it is said that the analogy of cases of wilful default precludes my doing this, because I should be taking the accounts on a different footing from that which is directed by the order of December, 1871. Those cases appear to me to come to this, that where wilful default is not pleaded no order can be made on the footing of wilful default, either at the hearing or at any subsequent time; but that where wilful default has been alleged, and a case is made for it on the pleadings, an account on the footing of wilful default can be directed, either at the hearing or trial of the action, or at any subsequent stage. That I take to be the result of the decision in *Job* v. *Job* (1), where the Master of the Rolls, on further consideration, said that under the new practice an order charging the Defendant with wilful default might be made at any time on a proper case being shewn, and he subsequently in *Mayer* v. *Murray* (2) explained that that could only be done where the pleadings justified it.

Applying that rule to the present case as nearly as I possibly can, I will ask under which of the two classes does the present case fall? The order of December, 1871, was made, as I have pointed out, without pleadings, on the application of the executrix of the testator against the surviving partners; but, although there were no pleadings, there were numerous affidavits filed in the suit, which must be taken to have been before the parties to the order of December, 1871, and to have been in the knowledge of the Court, for this reason, that the Court declared its opinion with regard to the interests of the parties, and it must have had some materials for so doing, and those materials could only have been the affidavits in the action.

Now, those affidavits did raise this case of fraud. Therefore, although in fact there were no pleadings, the order of December, 1871, was made on affidavit evidence in the suit which must be taken to have been in the nature of pleadings raising the case of fraud. This is equivalent, as nearly as analogy can apply, to a case in which the pleadings have alleged wilful default. I think, therefore, I am not precluded by the rules of the Court from adding this account.

In the next place it is said that it is unreasonable after the lapse of more than seven years to ask to add to and alter a decree pronounced by consent. *Primâ facie* there is a good deal of weight in that observation, and if I were really and in substance altering the mode of taking the accounts between the parties, I should have great hesitation in so adding to them. But I have seen the Chief Clerk and have learned from him the course of dealing between the parties. I find from his statement to me that, from the time when the accounts and inquiries were directed in December, 1871, down to a date long after the filing of the

(1) 6 Ch. D. 562.

(2) 8 Ch. D. 424.

certificate in December, 1876, both parties in taking the accounts proceeded on the footing of this fraudulent retainer having been charged, and that it was only after the certificate had been taken off the file, for a reason having no relation to the present matter, that this point was for the first time raised by the Defendant. Therefore, in making the order which I think I am bound to make, I am really only directing the accounts which have been already taken to be put upon the file. I am really only directing the accounts to be taken upon the footing on which the parties have hitherto taken them.

Some attempt has been made to find fault with the statement which has been made to me by the Chief Clerk with regard to the course of the proceedings before himself, but I have no doubt of the accuracy of his statement. Indeed, the certificate made in December, 1876, which was taken off the file for another reason, did include a finding of fraud. I should therefore be departing from the real understanding between the parties if I did not make the order asked for. It has been suggested that, this being a case of fraud, it ought to be raised in the most formal way by a fresh action, with a fresh statement of claim, and a fresh statement of defence, and ought to be sent to a jury to be tried. The testator's estate, as I understand, is insolvent. This matter has been in litigation in this suit from 1870 down to the present time, and I think it would be unreasonable and unjust now to send it to another tribunal, and the more so because it is evident that the question of this fraudulent retainer is mixed up in the most intricate manner with the other accounts which have been directed to be taken.

The result is that I shall add the account asked for, and I shall reserve the costs of the summons.

C. A.

From this order the Defendant appealed. The appeal came on to be heard on the 4th of August, 1879.

Higgins, Q.C., and *R. W. Ingham*, for the Appellant.

North, Q.C., and *J. T. Prior*, for the surviving partner, were not called on.

JAMES, L.J.:—

I am of opinion that the order of Mr. Justice *Fry* in this case must be sustained. When the facts come to be considered, being reduced to simple elements, the question raised here appears to me to have nothing at all to do with *Job* v. *Job* (1) or the other case of *Mayer* v. *Murray* (2), or to have any analogy to the proceedings for wilful default or neglect on the part of an executor. The case is this: A gentleman of the name of *Mackrell* had died, and his estate was administered, and is now being administered, in the Court at the instance of his legal personal representatives. The usual accounts and inquiries were directed in that proceeding for the purpose of ascertaining what debts were due. The surviving partner of Mr. *Mackrell*, takes in a claim in that suit and says, "This estate owes me a very large sum of money by reason of the misconduct of my partner deceased; he drew a great quantity of money from the partnership funds, and applied our clients' money in such a way that the partnership is liable to make it good, and he owes me therefore a large sum of money on the balance of the account. The balance is very large against him by reason of a great many of those items, or some of them, having been fraudulently obtained by him from clients and the fact fraudulently concealed by false entries in the partnership books." That is the charge made in the most distinct terms in the affidavit. Then, of course, in order to ascertain what is the balance due from the estate of the deceased partner, it was necessary that the partnership accounts should be taken. That might have been done in two ways: the suit might have been hung up while there was an action brought, or, as it was in those days, a bill filed for the purpose of taking the partnership accounts. In order to avoid the necessity, it being an insolvent estate, and known to be so, of a distinct suit resulting in nothing advantageous to the parties, the solicitors for the Defendant in the suit got an order made by a Judge in Chambers, in 1871, directing the usual partnership accounts to be taken, the surviving partners agreeing to be bound thereby as if there had been a decree for that purpose. It is said that that form of order would not allow the question of fraudulent withdrawal,

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(1) 6 Ch. D. 562.

(2) 8 Ch. D. 424.

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and the claim for interest based on the fraudulent withdrawal, to be raised. I beg to reserve my opinion on the question as to whether it could or could not have been raised indirectly, if not directly. I am not satisfied that in a decree of that kind, or in any order equivalent to a decree, the Chief Clerk or the Judge in Chambers could not have found specially the facts, and submitted the question to the Court at the hearing, as to whether, on the facts, the claim for interest was or was not sustainable. If it ever becomes necessary to decide that point, I shall decide it, but I shall reserve my final opinion until that time. However that may be, I am satisfied that the parties did not intend by this form of order to waive that claim.

If a man, having made a claim for principal and interest based on fraud, for the purpose of getting the partnership accounts taken in a better mode, or an easier or quicker mode, says he will waive the interest, then a different consideration arises. And if in this case there had been anything to satisfy me that there had been a deliberate intention to take the account in one form excluding interest, instead of in a form which enabled interest to be taken, I should have been very loth indeed to agree with Mr. Justice *Fry* that at this distance of time they are to have given to them the opportunity of adding anything to the order then made. I start with this, that I believe there was no intention whatever on the part of any party to that order for the inquiry, to exclude from the claim of the surviving partner the claim for interest, if he was entitled to it. That is to say, his claim being based on such frauds or such fraudulent abstractions as he should shew to have been made, Mr. Justice *Fry* says that he is satisfied that that was the understanding of the parties. The Chief Clerk has told him, of course accurately, what took place in Chambers, and that the accounts were taken, rightly or wrongly, on the footing that the order as it stood in 1871 did authorize the ascertainment and separation of the items which were chargeable with fraud so as to enable the parties to claim interest upon them. That being so, the parties having gone on upon that footing, it appears to me that no objection now from the lapse of time can be effectually raised. If the point had been raised sufficiently, if the difficulty had been started in 1872, the further order would have been made then, or probably it might have been said that the surviving partner must bring his action for the purpose of trying the question, and the administration of the estate must be suspended in the meantime. But the parties go on until 1874, before any doubt is raised, and then it is said counsel's opinion was taken, and he suggested that interest could not be charged on items in the partnership account. I do not know whether or not the point was raised that they could not under this decree at that time charge specially the fraud, or charge interest on the ground of fraud. Whatever was their view, the parties did go on—the Chief Clerk went on taking the account, ascertaining, as far as he could ascertain, the items which were chargeable with fraud and charging interest accordingly, and he made his certificate in 1876 to that effect; during which time it appears to me clear, from the correspondence—not that the thing could not be done under the order, that question was never effectually raised—but that the solicitors having the conduct of the case on the part of the estate said, " The question of fraud is not to be raised at all—we do not admit the fraud—you must prove the fraud as a fact." And that really is what they challenged them to do. Then the fraud was apparently proved to the satisfaction of the Chief Clerk, and I suppose that is the only ground on which he did give interest. Then the point was raised at the last moment after the order of 1876, that the order made by the Court in 1871 did not authorize an inquiry into these matters, and then it was said that, if that was so, it was a mere slip, and Mr. Justice *Fry* said, " I will now make the further order which should have been made then." Of course, if his story is true, that the one partner did take moneys by fraud from the partnership assets in such a way as to throw loss on them, he is entitled to have these moneys made good with interest. That is his right. He cannot be deprived of the right because the estate is being administered in the Court of Chancery, and it was the duty of the Court of Chancery in administering the estate to pay what was legally due to the claimant. In order to ascertain that, it is the duty of the Court to inquire into all the facts from which the amount really due is to be ascertained.

Then another point is raised. It is said that this cannot be inquired into in Chambers, but there must be a separate action. I do not know in what way a separate action would at all advance the question, or how the estate would be in the slightest degree benefited by its being the subject of an action instead of inquiries in Chambers. As I pointed out in the course of the argument, supposing there had been a separate action brought for the purpose of taking the partnership accounts, it would not have been necessary in that action to have proved every fraudulent abstraction, or more than one fraudulent abstraction. The moment a partner proves against his partner one fraudulent abstraction, one fraudulent entry, that is a sufficient ground for an inquiry in Chambers as to what amounts have been withdrawn, and to have every further account based on that inquiry. That would be done in Chambers exactly the same as if there had been a decree made to take the account on that footing. One item would be sufficient to enable the decree to be made, and afterwards everything would have gone on exactly in the same way in Chambers in that suit as they are going on in Chambers now. As Mr. Justice *Fry* pointed out, there is an insolvent estate, and I do not think it right or proper that an insolvent estate should be burdened with the additional pleadings, from which apparently no good could be derived.

I am of opinion, therefore, that the claimant is entitled to be paid what was justly due to him for principal and interest under the facts of the case; that he never intended to waive any part of that right; that he has that right now just as he had in October, 1871, not having waived it; and that he is not estopped by anything he has done or allowed to be done from now claiming from the estate that which was then justly due from his partner. The delay appears to me not to be made out. It is not such, in my opinion, as to put the parties in any worse position in disputing the fact of fraud as to every one of the items arising, or from raising any defence as to the whole of them, than they would have been in, in 1871. Therefore I see no reason why the inquiry should not be taken in Chambers as directed by Mr. Justice *Fry*. No doubt delay has occurred, but that delay is a loss to the creditors—probably a greater loss to the surviving partner than anybody else. He is a creditor to an amount which would sweep away the estate, and is the person who would be alone prejudiced by the length of time taken in investigating the accounts.

Brett, L.J.:—

It seems to me that this case raises questions of fact as well as questions of law, and it is necessary to state what is my view of the facts of the case in order to determine the questions of law. My view of the facts is this: There was a decree in 1867, and that was the only decree that has yet been made. By that decree certain accounts and inquiries were to be taken and made. The surviving partners may have been, and, as I have gathered, were in some respects, ordinary creditors for moneys advanced. And they had also been partners with *Mackrell*, and would be creditors upon the balance of the partnership account. They might also be creditors, and assert in an affidavit that they were, of *Mackrell* in respect of items with which he had dealt fraudulently as a partner with them. It would seem that they claim to be creditors on this estate in respect of the partnership accounts independently of fraud, and also in respect of certain transactions in the partnership on the ground of fraud; in the one case they would recover only certain sums, and in the other certain sums with interest. That being so, they desired to have an order for taking the partnership accounts, which order was made on the 1st of December, 1871, and was to this effect: "It is directed that in addition to the accounts and inquiries directed by the decree, the ordinary accounts and inquiries should be taken and made of and relating to the partnership dealings and transactions between the testator and his partners." When that order was obtained, certainly the charges of fraud had been brought forward, as well as charges of a claim in respect of ordinary partnership transactions. Both had been made by affidavit, and from the correspondence which took place at the time, and from the notes of the Chief Clerk, from the mode in which the parties acted afterwards, it seems to me that all parties thought that the order of the 1st of December would authorize an inquiry not only into the ordinary partnership balances not carrying interest, but also into the alleged fraudulent items that had occurred in the partnership. For we find that after that order inquiries went on before the Chief Clerk, and that in respect of certain items brought before him he put them down as sums due from the estate to the surviving partners without interest, and as to the others, he put them down as sums due from the estate to the surviving partners, with interest. It is obvious from that that he must have inquired into the questions of fraud with regard to all the items, and in some of them he came to the conclusion that there had been fraud, and with regard to the others that there had not. No party took any objection before him at the time that he was not entitled to inquire into the question of fraud. All parties seem to have submitted to that inquiry; and afterwards, in 1876, he made a certificate with regard to those matters. But then it was asserted, when it was discovered that part of the certificate was unfavourable to the Defendant, that he had no right to give the certificate, because the form of the order of 1871 did not allow him to go into the inquiry whether there had been fraud or not; that is to say, the certificate was objected to because that which has now been ordered by Mr. Justice *Fry* was either not contained in, or was not added to, the order of the 1st of December, 1871; and when he heard the account of what did take place, Mr. Justice *Fry* made the order now appealed from.

To that order many objections have been taken. First of all, it was said that it was a bad order, that the Court had no jurisdiction to make it, because it was an addition to the order of the 1st of December, 1871, which was a decree. Of course the validity of that argument depends without more upon the question of whether the order of the 1st of December, 1871, was a decree. In my opinion it was not, and therefore that doctrine does not apply. It was then said that it was inconsistent with and in conflict with the order of 1871. Now it seems to me obvious that the inquiry as to whether certain items are tainted with fraud cannot be inconsistent with ordinary inquiries; they can both go on together, they have both gone on together, and it is impossible to say the order of 1879 is inconsistent—that is, in conflict—with the order of 1871. It is an addition to it, but it is not in conflict with it. Then it was said that the inquiry as to these alleged frauds under the order of 1879 should not be allowed, because, by taking the order in 1871 in the form which it is, the surviving partners had waived the question of fraud altogether; and if they had intended to waive it—if the intention of the parties had been, by taking the order of 1871 in the form in which it is, to waive the charges of fraud which had been brought forward by the surviving partners, I should have been of opinion that they could not have brought those charges forward at any time afterwards—having once waived them they should never have been permitted to bring them forward again. But I am of opinion upon the evidence as a fact that they did not intend to waive them, but that all parties supposed that under that order they were entitled to go into questions of fraud. It seems to me that it cannot be said there was any waiver at all by reason of a mistake, and a common mistake. A common mistake is not a waiver. Then it is said, although there was no intentional waiver, yet there has been such a long delay that the order of 1879 ought not to be allowed on account of that delay. Now I should have thought that that also would have been a formidable objection if there had been no mutual mistake in the order, but inasmuch as there was a mutual mistake in 1871, and all parties went on with that inquiry, from 1871 to 1876, on the footing that that order allowed the inquiry into the frauds, and the objection is taken merely upon the discovery of the blunder by one side, I cannot think the delay is in this case sufficient. Then it is said that this inquiry ought not to be allowed on questions of fraud except in an action charging the fraud. Nobody asked for it. Nobody ever asked that this question should be tried in the form of an action. The whole contest has been to endeavour to shut out the inquiry in any form on account of the form of the order of 1871, which form originated in this mistake made by all parties. I cannot think that there is any ground for impeaching the order of 1879, and, therefore, this appeal fails.

COTTON, L.J.:—

There are several questions raised on this appeal, and the first one to consider is this, that the Court has no jurisdiction, and that it was contrary to the established principles on which the Court acts, to direct this further inquiry to be made. It is unnecessary, in my opinion, to enter into the question whether or no, when no decree for wilful default has been made at the hearing, there can subsequently be, by an order on summons, or by any other means, an inquiry directed charging the Defendant with wilful default, because that case does not arise, and such cases as *Job* v. *Job* (1) are out of the question. When the point arises before us it will be time for us to give an opinion upon it. But I ought to say why it differs from it. This is not a case where an action has been brought and a decree has been made, and part of the relief which might have been given by that decree has been omitted, because the evidence did not enable the Court to make such a decree, or because the pleadings did not raise it; but it is this: the Court is administering the estate of a deceased party, and on the hearing of the suit instituted for that purpose it directed an inquiry, amongst other things, what were the debts of the testator. That was for the purpose, not of litigating adverse rights or deciding on adverse rights as between the Plaintiffs in the suit and the Defendant, because they were both personal representatives, the Defendant being also interested in the estate, but for the purpose of enabling the Court to clear the estate, to pay all the claims against the estate, to ascertain the surplus, and then, and not till then, to hand it over to the persons beneficially entitled. Really, what we are considering in this case is whether or no the surviving partner has or has not a claim against the estate of the deceased, which claim, if established, must be made good out of the estate before the Court can say that there is any surplus remaining; and if it is a claim in the nature of a specialty having precedence it must be paid before any money can be paid to the simple contract creditors. Whether it is a specialty claim or not, the Court having the fund in hand is bound to investigate it before it deals with the fund as if no such claim existed. Of course that is subject to this, that the creditor, the claimant, may have precluded himself from ever raising the claim, and that, therefore, the Court may be at liberty to distribute the estate without having regard to the claim which is raised. But it is not now a question of adding to an original decree, or giving an order on a summons, or giving on further consideration a decree other than and different from that given at the original hearing.

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(1) 6 Ch. D. 562.

It is only a question of working out the claims and of directing such inquiries as are necessary for the purpose of seeing whether a claim is or not well founded.

That being so, the claim now raised is in substance a claim to have interest on partnership accounts which would not usually be given on certain sums alleged to be—of course I give no opinion on that fact—fraudulently withdrawn from the partnership by the testator *Mackrell.* Certainly at first sight it does look somewhat singular that this claim should be brought forward now, about twelve years after Mr. *Mackrell* is dead, and more than eight years after the original inquiry was directed. But is the claimant precluded from bringing it forward? Unless he has in some way or other precluded himself, why is he to be prevented raising this claim? I was very much struck at first with the form of the inquiries directed in 1871, having regard to the fact that there was, when those inquiries were directed, an affidavit brought in by the present claimant raising the exact point now in question, charging the fraud and claiming interest; because it struck me before I had heard all that could be said in the case that those inquiries were probably the result of some arrangement entered into between the claimant and the personal representatives of the deceased partner, that notwithstanding the claim had been brought in charging fraud, the claim founded on fraud should be waived, and that those accounts should be taken. I intend to give no opinion on the question whether or no on those original inquiries this matter would or would not be open. Assume for this purpose, to test the decision of Mr. Justice *Fry,* that it was not open on those inquiries. Then, assuming that to be so, can we also assume, or can we arrive at the conclusion that the intention of taking the inquiries in that form was to preclude the claimant from entering into the question which he now seeks directly to raise by this additional inquiry? I asked whether there was any correspondence or minute which precluded the inquiries being taken in that form. There is none. No doubt there has been a change of solicitors, but one would expect, if either party or both parties intended that there should be a waiver of the charge of fraud, that there would be some correspondence or some minute of the intention. But when we come to look at the circumstances of the case, there

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being nothing to shew affirmatively that there was such intention, in my opinion the evidence is the other way. On the claim being brought in, it appears that in 1874 the attention of one of the parties was called to the doubt as to whether or not this matter could be raised under those forms of inquiries, and up to that time apparently that party at least had not been aware that there was this objection. Apparently the attention of the parties was then first called to it by the opinion of counsel, and up to that time it was not supposed that under that form of inquiry the matter could not have been entered into. This, whether right or wrong, is strong evidence to shew that it was not in the mind of either party that by taking the form of inquiry adopted in 1871, this matter of fraud was waived, or that the claim now raised was precluded; that when the charge of fraud is made by the claimant as against the estate of Mr. *Mackrell*, the answer is not, "You have taken a form of inquiry which precludes you from entering into that point," but, "I dispute the fact; the fraud is not made out;" and when the solicitor acting for the personal representative is asked to investigate the matter he does not say, "You have waived it," but he says, "That must not be; you must prove the fraud." And we have this addition, if anything additional was necessary, that inquiries appear to have been directed at the suggestion of the Chief Clerk, and in the note of his suggestion there is nothing at all appearing as regards a waiver of fraud; apparently it was more a question as to the way of ascertaining those facts which would be necessary to be entered into for the purpose of dealing with the claim carried in by the surviving partner, which was based on this question of fraud. Therefore, in my opinion, it cannot be said, and it would be wrong to come to the conclusion that, independently of the question of delay which I will now enter into, the taking the original inquiry in that form was intended to, and in fact does, preclude the parties from raising this question now.

But then we come to the question of delay, and if it could have been said that either in the delay since 1871, or the delay since 1874, when the attention of the claimant was called to this, anything he had done had prejudiced the estate, in dealing with this question it might have been a serious question for consideration as to what course we should take; but from 1871 down to the filing of the certificate, which was afterwards taken off the file, the matter was entered into and raised by this affidavit, made in 1871, the particular nature of the fraud was stated, and, as I understand, those items were entered into. From 1874 no doubt the claimant went on with a knowledge that the objections would be taken, but though I asked, for the purpose of doing justice between the parties, whether there was any prejudice in consequence of his coming now to correct a mistake, if any, rather than coming in 1874, nothing could be suggested except that evidence might possibly be lost (although apparently there is no ground for suggesting that any has)—or rather that the matter cannot be investigated now as well as it might have been if this matter had been set right in 1874, or as well as if the original inquiries in 1871 had been so framed as to raise this question.

But then comes the question as to whether or no we ought to allow an inquiry to be directed for the purpose of raising and bringing out these facts, or whether there should be an action. The counsel for the Appellant in his argument said he did not object, and never had objected, to an action. That, I must confess, seemed to me somewhat inconsistent with his argument about adding inquiries for wilful default, and likening this to an inquiry for wilful default not being within the jurisdiction of the Court, because it would be giving by a supplemental order that which properly ought to be made at the hearing of a supplemental bill in the nature of bill of review, or something of that sort. In this case there could not be, if it be necessary, a supplemental bill in the nature of a bill of review, because, treating the inquiries in December, 1871, as an original decree, at that time the claimant clearly knew of those facts on which he makes his present claim, and a supplemental bill in the nature of a bill of review, if necessary, would be out of the question, but the action would clearly, if necessary, be something of that nature. But still one must consider whether or no there is any prejudice by its being an inquiry in Chambers instead of in some other way. It is obvious that in substance this inquiry must always have been in Chambers and not in Court. As Lord Justice *James* has pointed out, if there had been a bill filed or an action brought for taking the partnership accounts like the executorship accounts, and one fraudulent withdrawal of money was proved at the hearing, that would have been a sufficient ground for directing a general inquiry as to the sums improperly withdrawn; and one knows that, as against defaulting parties, whether partners, executors, or agents, large sums are constantly recovered, and in the Court of Chancery, by inquiries in Chambers after a decree where only one item has been entered into and a general account directed. I see really no substance in that objection.

Then it was said, and I tried to ascertain what tangible form it was put in, that there would have been a defence if an action had been brought which now could not be raised. If there had been affidavits brought forward shewing really that there was a defence to the claim by the surviving partner in respect of these matters, then, in my opinion, the Court should have attended to those affidavits for the purpose of seeing whether this additional inquiry, if necessary, should be given just as if it had been a defence to an action. But nothing tangible has been brought forward. It has been suggested by the Appellant's counsel that the surviving partner participated in the sums so fraudulently received or improperly retained, that he had with knowledge participated in the dealings with those funds, and that, as against him, this would be an answer to the charge of fraudulent retainer. The retainer would still be fraudulent as against the client, but would not be so against the partner who knew of the retainer having been fraudulent. It would be his act as well as that of Mr. *Mackrell*, and therefore, as between the partners, would not be a fraudulent withdrawal of money in such a sense as to entitle the one who did not actually withdraw it to charge the other with fraud, and on that ground to claim interest. That would be a defence to the particular item. But Lord Justice *James* has been good enough to suggest, and I quite acquiesce in it, that to prevent any possibility of prejudice by directing this further inquiry instead of some original proceeding for the purpose of raising the question, there should be liberty for the Chief Clerk, at the instance of the Defendant, to find as special circumstances any facts shewing that the surviving partners had participated in the profits arising from the client's money having been improperly abstracted with the knowledge that it had been so abstracted. If, therefore, the

Defendant in this case desires it, there may be an addition to the inquiries for the purpose of enabling her to raise that defence. Of course, if she asks for such an inquiry, and, asking for it, insists on its being prosecuted in Chambers, it will be at her risk as regards costs; therefore she must consider whether there is any good foundation for the suggestion, or otherwise it would be a mere expense of which she would have to bear the burden.

JAMES, L.J.:—The Appellant must pay the costs of the appeal.

Solicitors for Appellant: *Mason & Edwards.*
Solicitors for Respondent: *Lethbridge & Son.*

DOLLMAN *v.* JONES.

[1878 D. 109.]

C. A.
1879
Aug. 7.

Practice—Motion for New Trial—Rejection of Evidence—Rules of Court, 1875, *Order* XXXIX., *r.* 1.

Where, on a trial in the Chancery Division, the Judge has not found a separate verdict on a question of fact, but has decided the case as a whole according to the old practice of the Court of Chancery, a motion for a new trial on the ground of improper rejection of evidence cannot be made, the remedy of the unsuccessful party being by appeal from the order, and the Court of Appeal having power at the hearing of the appeal to admit any evidence which may have been improperly rejected.

Krehl v. *Burrell* (1) distinguished.

THIS was an action to rectify a marriage settlement made in 1876. The lady was a widow with children. By the settlement the funds were settled in trust for the wife for life, then for the husband for life, then for the children of the marriage, and in default of children, then, if the wife died in the husband's lifetime, upon such trusts as the wife should by will appoint, and, in default of appointment, upon trust for the persons who would on the decease of the wife have been entitled to her personal estate under the Statutes of Distribution if she had died intestate and without ever having been married. There were no issue of the marriage.

(1) 10 Ch. D. 420.

The wife died in 1876, and the husband in 1877. The Plaintiffs were the wife's children by her former marriage. The Defendants were the trustees of the settlement, and the wife's surviving brothers and sisters, and the children of her deceased brothers and sister.

The Plaintiffs sought to rectify the settlement on the ground of mistake, as not being conformable to the instructions given by the wife to her solicitors, which were alleged by the Plaintiffs to be that the property after the life estates should be held upon such trusts as the wife should by will appoint, and, in default of appointment, for her children.

The wife's brothers and sisters and nephews and nieces by their defence alleged that the wife considered her children by the first marriage well provided for, and did not intend to make any further provision for them.

The action came on for trial before Mr. Justice *Fry*, and witnesses were orally examined. The Plaintiffs were prepared with witnesses to prove that after the marriage the husband and wife had repeatedly stated that the settlement gave the Plaintiffs an interest in the property. Mr. Justice *Fry* held that such evidence was neither relevant nor admissible, and these witnesses accordingly were not examined. At the conclusion of the arguments the learned Judge held that the Plaintiffs' case was not made out, and dismissed the action.

The Plaintiffs now moved for a new trial on the ground of improper rejection of evidence.

North, Q.C., and *Rigby*, for the Respondents, took a preliminary objection:—

The only course open to the Plaintiffs is to appeal from the judgment. There were no separate issues and no verdict, as in *Krehl* v. *Burrell* (1). Order XXXIX., rule 1, of the Rules of Court, 1875, as amended, applies only to the Queen's Bench, Common Pleas, and Exchequer Divisions, as was held in that case. If, on appeal the Court of Appeal thinks the evidence relevant, it can allow it to be brought in; but there cannot be any application for a new trial where there is no separate verdict on an issue of fact.

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(1) 10 Ch. D. 420.

Cookson, Q.C., and *W. P. Beale*, for the motion :—

If this objection holds, there cannot be any motion for a new trial before a Judge of the Chancery Division. Order XXXIX., rule 1, does not apply to that Division, as was held in *Krehl* v. *Burrell* (1). We, therefore, are thrown back on the old practice, and come within the *Judicature Act*, 1873, s. 23.

[JAMES, L.J. :—How can the old practice help you? There never was such an application as this under the old practice of the Court of Chancery.]

Fernie v. *Young* (2) shews that a new trial before a Judge of the Chancery Division may be directed.

[JAMES, L.J. :—That was a case where issues of fact were tried separately under *Lord Cairns' Act* (21 & 22 Vict. c. 27). Here the whole case was tried together both as to law and fact.]

Then there is no mode of obtaining a new trial for improper rejection of evidence.

[BRETT, L.J. :—You do not want it. If evidence has been improperly rejected, the Court of Appeal can let it in on the hearing of the appeal.]

This does not guard against its being lost by the death of the witnesses, which is very probable in the present case.

F. A. Lewin, for other parties.

JAMES, L.J. :—

The objection must prevail. In *Krehl* v. *Burrell* we went as far as we could towards assimilating the practice of the Chancery Division to that of the Common Law Divisions. Where a Judge has done what the Master of the Rolls did in that case, defined an issue and found a verdict upon it, we follow the rule of the Common Law Divisions, and the objection that such a practice was unknown in the Court of Chancery is got over. In the Court of Chancery there was no such thing as a motion for a new trial. There was an appeal, and on appeal every question came before the Court of Appeal. That practice has never been

(1) 10 Ch. D. 420.

(2) Law Rep. 1 H. L. 63.

abolished, and where the Judge does not do what was done in *Krehl* v. *Burrell* (1) it continues in force. I should be sorry to establish a rule which would make every case in the Chancery Division subject to a motion for a new trial.

BRETT, L.J. :—

I am sorry to see such a result of *Krehl* v. *Burrell* as the present application. I think it convenient that in cases in the Chancery Division the old practice should continue. It was held in *Krehl* v. *Burrell* that Order XXXIX., rule 1, does not generally apply to cases in the Chancery Division. The Court in that case was somewhat astute in going as far as it could in assimilating the practice in the different Divisions; but when it was decided that the order does not apply generally in the Chancery Division, it seems to follow that the Court cannot go the whole way in such assimilation. I do not say that if I had been one of the Judges sitting in appeal on *Krehl* v. *Burrell* I should not have agreed with the conclusion there arrived at, though I have some doubts on the question, which, however, are unimportant, since that decision stands as a decision of the Court of Appeal, and is binding; but it does not apply here. This case is not within the order; we therefore must fall back upon the old practice as nearly as we can. There is nothing here to prevent the full application of the old rule in Chancery, which was that where issues had been directed under *Lord Cairns' Act* there could be an application for a new trial, but not otherwise. No harm can result from following this practice, as the Court of Appeal can on the hearing of the appeal let in any evidence which may have been improperly rejected.

Solicitors: *Beale, Marigold, Beale, & Groves; Whateley, Milward & Whithead; Mathews & Smith.*

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(1) 10 Ch. D. 420.

Ex parte HARDING. *In re* SMITH, FLEMING, & CO.

C. A.
1879
Aug. 7, 8.

Proof in Bankruptcy—Joint and Separate Estate—Joint and Several Liability of Partners—Guarantee—Construction.

A firm of *S. & Co.* consisted of three partners, *F.*, *R.*, and *N.*, and carried on business in *London*. Another firm of *N. & Co.* consisted of five partners, *F.*, *R.*, *N.*, *H.*, and *M.*, and carried on business in *India*. In September, 1872, *N. & Co.* applied by letter to a bank for a credit, agreeing to deliver to the bank as security "the personal obligation of this firm and individual partners, and a guarantee by *S. & Co.*" The bank granted the credit, and under it *N. & Co.* received large advances. In February, 1874, a letter was addressed to the bank, signed by *S. & Co.* and also by *F.*, *R.*, and *N.*, saying, "We hereby guarantee you payment of all sums which are or may at any time become due to you by *N. & Co.* under the credit applied for in September, 1872, and granted by you." This letter and the signature of *S. & Co.* to it were written by *F.*, and he had negotiated the original transaction with the bank. *S. & Co.* filed a liquidation petition, and *N. & Co.* stopped payment, a large sum being due to the bank under the credit:—

Held, that the letter of February, 1874, pledged to the bank the joint liability of the firm of *S. & Co.*, and also the separate liability of each of the three partners who signed it, and that the bank were entitled to prove against the separate estate of *F.* for the amount due to them by *N. & Co.* under the credit.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

John Fleming, *Robert McIlwraith*, and *William Nicol* traded in partnership in *London*, as *East India* merchants, under the firm of *Smith, Fleming, & Co.* They also, together with *H. Maxwell* and *W. G. Hall*, traded in partnership at *Bombay*, under the firm of *William Nicol & Co.*, and at *Kurrachee* under the firm of *Fleming & Co.*

On the 30th of September, 1872, the following letter was addressed by *William Nicol & Co.* to the manager of the *City of Glasgow Bank, Glasgow*:—

"*Bombay*, 30th September, 1872.

Dear Sir,—With reference to our application to you, dated 11th April, 1872, for a credit of £120,000, and to our letter to you of this date, we beg you will grant us an increased circular credit to the extent in all of £300,000, in sums not exceeding £50,000 per month, to be drawn for from *Bombay* at six months' sight, and extending over a period of six months. As cover for this credit we undertake to hold at your disposal the property detailed in the annexed schedule, and to execute, when called upon to do so, such deeds or transfers as you may require, and to perfect the security to your satisfaction.

. . . .

"And, as further security for said credit, we oblige ourselves to deliver to you (1) the personal obligation of this firm and individual partners, and a guarantee by Messrs. *Smith, Fleming, & Co.*, of *London*, for the amount of the credit; and (2) an assignation or other transfer of the shares or interests of Messrs. *John Fleming* and *Robert McIlwraith* in our firm, and in the firm of Messrs. *Fleming & Co.*, of *Kurrachee.*

"Yours faithfully,
(Signed) "*W. Nicol & Co.*"

"P.S.—It is further understood and agreed that we are to keep the bank out of cash advances in respect of drafts that may be drawn under the said credit. We will thank you to hand the credits to which the foregoing application refers, as they are prepared, to our mutual friends Messrs. *Smith, Fleming, & Co.*, of *London*, on our behalf.

(Signed) "*W. Nicol & Co.*"

On the same day another letter in similar terms was addressed to the bank from *Kurrachee* by the firm of *Fleming & Co.*, requesting the bank to grant to that firm a circular credit for £60,000. The bank agreed to grant both credits as requested.

On the 28th of February, 1874, the following letter was addressed to the bank:—

"*London*, 28th February, 1874.

"Gentlemen,—We hereby guarantee you payment of all sums which are or may at any time become due to you by Messrs. *W. Nicol & Co.*, of *Bombay*, under the circular credit for £300,000 applied for by them by letter of application dated 30th of

September, 1872, and granted by you, and that to the extent of the said sum and interest from the date of advance.

"We are, Gentlemen,
"Your obedient servants,
(Signed) "*Smith, Fleming, & Co.*,
"*John Fleming*,
"*R. McIlwraith*,
"*W. Nicol.*"

The body of this letter, and the signature to it of *Smith, Fleming, & Co.*, were in the handwriting of *John Fleming*. On the same day a similar letter, signed by the same parties, was addressed to the bank in relation to the circular credit for £60,000. The body of this letter also, and the signature to it of *Smith, Fleming, & Co.*, were in the handwriting of *John Fleming*. From the 30th of September, 1872, until the stoppage of *Smith, Fleming, & Co.*, *W. Nicol & Co.*, and *Fleming & Co.* early in October, 1878, the two credits were regularly operated upon by *W. Nicol & Co.* and *Fleming & Co.* respectively, and at the date of the stoppage there were current bills, drawn on the bank under the credits, to the amount in the whole of £385,500. The bank stopped payment on the 2nd of October, 1878, and went into voluntary liquidation, and the whole of the bills for £385,500 were proved as debts of the bank in the liquidation. The creditors of *Smith, Fleming, & Co.* resolved upon a liquidation by arrangement. The liquidators of the bank claimed to prove for £360,000 against the separate estate of *John Fleming*. The trustee rejected the proof, on the ground (*inter alia*) that the two letters of the 30th of September, 1872, did not, either alone or in conjunction with the guarantees dated the 28th of February, 1874, create any separate liability on the part of *John Fleming*, so as to entitle the bank to prove against his separate estate. The liquidators applied to the Court for an order that the trustee should admit the proof. One of the liquidators made an affidavit, in which he said that *John Fleming*, as the senior partner in all the three firms, was the one who personally negotiated with the bank for and arranged the credits and the terms upon which they were to be granted, including the agreement that the individual partners in the firm were to be separately liable for the credits, in addition to the liability of the firm. The liquidator also said that the whole of the bills drawn under the credits were drawn with the knowledge, sanction, and approval of *John Fleming*, who, as the senior partner in all the firms, had mainly conducted the correspondence with the bank in regard to the bills. This evidence was not contradicted. The Registrar made an order declaring that the bank were entitled to prove against the separate estate of *John Fleming* for such sum as might be found due to them under the two letters of the 30th of September, 1872. The trustee appealed.

Southgate, Q.C., and *Aspland*, for the Appellant:—

Whatever may have been intended by the letters of the 30th of September, 1872, nothing was afterwards done to carry out the agreement, except the writing of the two letters of the 28th of February, 1874. No personal obligation of the firm of *Nicol & Co.*, or of the individual partners in it, was asked for by the bank or given to them. It is true *Fleming* signed the letters of the 28th of February, but his signature and those of the two other partners in *Fleming & Co.* is explained by the fact that as a general rule one partner has no authority to sign a guarantee in the name of the firm without the express assent of all the partners: *Brettel* v. *Williams* (1); *Lindley* on Partnership (2). The signatures of the partners were added to that of the firm in order to prove that they had assented to the giving of the guarantee. This is a common practice in *Scotland*. The letter of the 28th of February amounts therefore to nothing more than a guarantee of *Smith, Fleming, & Co.*, or, at any rate, to a joint guarantee of the firm and the three partners in it. No separate liability is imposed on the partners.

[JAMES, L.J.:—There is no joint estate except that of *Smith, Fleming, & Co.*]

A promissory note signed by several persons, and beginning "We promise," is a joint note only: *Byles* on Bills (3). The words "we guarantee" are necessarily joint only. Even if all the partners in *Nicol & Co.* had signed it would only have been a joint guarantee. Of course, if there had been no bankruptcy, the separate estate of each partner could have been taken in execu-

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(1) 4 Ex. 623.

(2) 4th Ed. vol. i. p. 281.

(3) 11th Ed. p. 7.

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tion; but in bankruptcy there cannot be a proof against the separate estate. Instruments of this kind are always construed very strictly: *Ex parte Fairlie* (1); *Ex parte Flintoff* (2). If a partner pledges his separate estate for a debt of the firm, he does so in the character of a surety: *Duncan, Fox, & Co.* v. *North and South Wales Bank* (3). If the three partners who signed the letter of the 28th of February intended at all to make themselves severally liable, they intended to do so only in case the five partners in *Nicol & Co.* signed the letter. Two of the partners have never signed, and therefore the three who did sign are not liable: *Evans* v. *Bremridge* (4); *Bonser* v. *Cox* (5).

De Gex, Q.C., and *D. Sturges*, for the liquidators of the bank:—

The original letter of the 30th of September is a contract to give the bank the liability of the firm of *Nicol & Co., i.e.*, the joint liability of the partners, and the separate liability of each partner; the contract can have no other meaning. It is an absolute engagement to deliver to the bank that security; and on the faith of the engagement the money was advanced. How can the very man who negotiated the transaction repudiate his liability, the firm having had all the benefit?

[JAMES, L.J.:—It is his separate creditors who are objecting.]

They are bound by all the equities which affect their debtor. He has agreed to give his separate liability, and the Court of Bankruptcy is a Court of Equity as well as of law. We should be entitled to prove against the separate estate, if the case stood only on the letter of the 30th of September.

But the letters of the 28th of February clearly impose a separate liability on each partner who signed them. An agreement *primâ facie* joint may be construed to be several, if the interest of either party, appearing on the face of the instrument, shall require that construction: *Chitty* on Contracts (6); *Sorsbie* v. *Park* (7); *Foley* v. *Addenbrooke* (8); *Hopkinson* v. *Lee* (9); *Haddon* v. *Ayers* (10).

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(1) Mont. 17.

(2) 3 M. D. & D. 726.

(3) 11 Ch. D. 88.

(4) 8 D. M. & G. 100.

(5) 6 Beav. 110.

(6) 10th Ed. p. 95.

(7) 12 M. & W. 146, 158.

(8) 4 Q. B. 197.

(9) 6 Q. B. 964.

(10) 1 E. & E. 118.

If five people say, we will jointly and severally do a certain thing, any one of them can be compelled to do his part. The evidence shews that all the five partners intended and agreed to be separately liable. At any rate the partner who actually negotiated the transaction with the bank cannot escape liability, and his creditors can stand in no better position than himself. In mercantile matters a joint obligation has been held on very slight grounds to be joint and several, and the Court of Chancery would, if necessary, reform it: *Thomas* v. *Frazer* (1); *Bishop* v. *Church* (2); *Underhill* v. *Horwood* (3); and in bankruptcy rectification is not necessary, but the Court will allow proof to be made according to the intention: *Underhill* v. *Horwood* (4); *In re Bate & Henckell* (5); *In re Freeman & Grace* (6). In *Burn* v. *Burn* (7) the question was whether a joint bond could be held to be several in a suit for the administration of assets, and Lord *Loughborough* said (8), "Is there any case where it has been done against creditors? It is in bankruptcy, because they are all equal." The letters of the 28th of February, 1874, must be construed as giving the separate guarantee of each partner who signed them; no meaning can otherwise be given to their signatures. At any rate *Fleming*, who himself signed the name of the firm of *Smith, Fleming, & Co.*, could never have said that those letters did not give the guarantee of the firm, and his own signature could have been added for no reason, except to give his separate guarantee.

Southgate, in reply:—

The personal obligation of the individual partners in *Nicol & Co.* was never delivered to the bank, because they never asked for it. It was probably never supposed that the rule in bankruptcy as to joint and separate estates would come into operation. The Court is now dealing with the rights which have actually been created; not with those which might have arisen. In *Sorsbie* v. *Park* (9) the question was whether a covenant was joint as regarded the covenantees, whether some of the covenantees could sue alone, and it was held that they could not: *Foley* v. *Addenbrooke* (1) and *Hopkinson* v. *Lee* (2) were cases of the same kind.

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(1) 3 Ves. 399.

(2) 2 Ves. Sen. 100, 371.

(3) 10 Ves. 207, 227.

(4) Ibid. 227.

(5) Cited 3 Ves. 400.

(6) Cited 3 Ves. 401.

(7) 3 Ves. 573.

(8) Ibid. 575.

(9) 12 M. & W. 146.

In *Haddon* v. *Ayers* (3) the Court laid hold of the words "executors and administrators" to shew that a liability to each covenantee separately must have been intended. *Thomas* v. *Frazer* (4) was a case in Chancery; the man who had given the joint bond was dead, the mistake was admitted, and the Court reformed the bond. Moreover, when a partner is dead his separate estate can be made available for partnership debts. Here the Court has to construe the actual document. *Burn* v. *Burn* (5) and *Bishop* v. *Church* (6) were similar cases. In *In re Bate & Henckell* (7) the debt created by the advance to one partner had not been merged in the joint bond, and in *In re Freeman & Grace* (8) the mistake was admitted. The law on the subject is summed up in *Lindley* on Partnership (9), where he refers (*inter alia*) to *Beresford* v. *Browning* (10). In that case it was held that an agreement, though in terms joint, was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and that the liability remained joint and several. *Kendall* v. *Hamilton* (11) shews that a partnership contract cannot be treated as several during the lives of all the co-contractors.

JAMES, L.J.:—

I am of opinion that the Registrar was quite right in his conclusion. According to my view it is not necessary for us to deal with the very elaborate and ingenious argument of Mr. *De Gex* as to the first document, or to consider whether, supposing that the first document had stood alone, the Court would have established a joint and several liability of all the partners in *Nicol & Co.*, when it had been shewn that they had all assented to the giving of that document; for we are not now dealing with the case of a partner who was not also a party to the second document. It is conceded that if the second document, the letter of February, 1874, had been signed by four distinct individuals, not members of a firm, it would *primâ facie* have imported only a joint contract. But, in the first place, in construing the document we are entitled to look at the whole of it, including the signatures, and to see who the persons are who are expressed to be bound by it. And, if we do this, it seems to me utterly impossible to give a reasonable, a business meaning to the document as a joint guarantee of a firm composed of three persons, and of the same three persons joining with that firm. That seems to me to be an utterly impossible construction, one not capable of being expressed in language. "We the firm of *Smith, Fleming, & Co.*, and we, *John Fleming, R. McIlwraith*, and *W. Nicol*, the partners in that firm, hereby guarantee you (the bank) payment" of what is due under the credit. How is it possible to say that that is a joint guarantee, or to suppose that any man of common sense giving or receiving such a document, gave it or received it in any other sense than as creating a liability of the firm and also a separate liability of each of the other persons who signed it, distinct from and in addition to his liability as a member of the firm? That must be the meaning of it from the very nature of the case. And if so, the whole question is determined as against *Fleming*. If it is a joint guarantee at all, it is a joint guarantee by *Smith, Fleming, & Co.*, and the three partners in that firm. But there is no joint estate of the firm and of the three partners; there can be no such joint estate. If the signatures were those of four distinct persons and they became bankrupt, there could be no joint estate to which the guarantee could apply. But it is said that by the original agreement it was intended that all the five partners in *Nicol & Co.* should join in the guarantee, and as only three of them did join, the liability cannot be enforced against those three. The answer is that that is an equity which must be alleged and proved. If three persons sign a document, and it is said that they are not liable, because the intention always was that they should not be liable unless some other persons should also sign, that is an equity to get rid of a legal liability. *Fleming* has not alleged anything of the kind, and it would be idle for him to say that it was not intended he should be bound unless all his partners were bound. The case is reduced to the business interpretation of the second document, and I am unable to give any other meaning to it than that it was intended to be the obligation of the firm of *Smith, Fleming, & Co.* with the additional separate obligation of each member of that firm.

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(1) 4 Q. B. 197.
(2) 6 Q. B. 964.
(3) 1 E. & E. 118. 5 Jur NS 408
(4) 3 Ves. 399.
(5) Ibid. 573.
(6) 2 Ves. Sen. 100, 371.
(7) Cited 3 Ves. 400.
(8) Cited 3 Ves. 401.
(9) 4th Ed. vol. i. pp. 369–373.
(10) 1 Ch. D. 30.
(11) 3 C. P. D. 403.

BRETT, L.J.:—

We have to construe two mercantile documents, which we cannot expect to find expressed in legal language. But we have to see whether, though the language may not be strictly accurate, the parties have not done that which they intended to do. A credit was to be opened by the bank in favour of *Nicol & Co.*, that is, an advance was to be made by the bank to *Nicol & Co.* When the bank should have made that advance the firm would become liable for it, and every member of the firm would become liable to the full extent of his property. There might be a difficulty in suing the members of the firm, and another difficulty might arise (which might have been well known to both the bank and *Nicol & Co.*), by reason of the rule in bankruptcy which prevents a proof being made against the separate estate of a partner in respect of a joint debt of the firm, until the separate creditors have been satisfied. It seems to me, looking at all these circumstances, that the meaning of the first document is this, We oblige ourselves to deliver to you the personal obligation of this firm, and also the personal obligation of each individual partner in it. The personal obligation of the firm can mean little more than this, You shall have a document signed on behalf of the firm. But the individual personal obligation of each member of the firm seems to me to mean this, that the bank should be able to sue each individual member of the firm, and that in the event of bankruptcy they should be able to prove against the separate estate of each member of the firm. It is difficult to call this a guarantee at all. It is not a legal guarantee; it is a primary obligation. It is an undertaking that the bank shall be able to sue each individual partner as well as the firm, and that the separate estate of each partner shall be liable, notwithstanding the rule in bankruptcy. It is an undertaking by the firm of *Nicol & Co.* to procure this to be done, and all that was necessary to be done afterwards was that each of the partners should give his assent. It was not necessary that this assent should be given in writing; the assent might be proved in any way. If it was strictly a guarantee it must be in writing, by reason of the provisions of the *Statute of Frauds*, but, in my view, it was not strictly a guarantee. That, then, being the construction of the first document, what is the meaning of the second? It is said, and indeed the argument must necessarily go to that extent, that the signatures of the individual partners are no evidence of their assent to the previous agreement. It is said that it is nothing but the guarantee of the firm of *Smith, Fleming, & Co.*, and that the signatures of the partners are only evidence of their assent to the guarantee of the firm. The guarantee which was to be given was that of *Smith, Fleming, & Co.;* there was no agreement to procure the guarantees of the individual partners in that firm. No doubt the second document is a guarantee by *Smith, Fleming, & Co.*, and was so intended. But the question is, what is the meaning of the other signatures? In the strict legal signification, if I am right in my view, the words "we guarantee" are not applicable to the individual partners. But their obligation, although it would be a primary one to the bank, would still be an additional security, greater than the mere obligation of *Nicol & Co.*, and among merchants an additional security is often spoken of as a guarantee. The words "we guarantee," so far as regards the signatures of the three partners, do not, strictly speaking, imply a guarantee, but the individual liability of each of those partners and their estates which it had been agreed that each member of *Nicol & Co.* should undertake. In my opinion those signatures were given, not as members of *Smith, Fleming, & Co.*, but as members of *Nicol & Co.*, and that was their intention in signing. And, therefore, the doctrine that one of a number of sureties who signs a guarantee only agrees to be liable in case all the others sign, has no application. The intention was that the bank should have the separate liability of as many of the partners in *Nicol & Co.* as they could get. The signature of *Fleming* is evidence of his assent to the original agreement, and is an acceptance by him of the separate liability. I think that the intention of the parties is sufficiently expressed in these two mercantile documents, and that *Fleming* agreed to be severally liable. Consequently, the proof has been properly admitted against his separate estate.

COTTON, L.J. :—

I also am of opinion that the proof has been properly admitted. I express no opinion how the matter would have stood if there had been only the first document. No doubt, if the signatures to the second document had been those of four individuals, it must have been construed as only creating a joint liability. But the construction of every document must depend upon all the facts and circumstances, and you must see whether the names affixed to it are those of persons who could contract jointly. In this case three of the names are those of distinct individuals, the fourth is the name of a firm composed of those same individuals. It is not the name of a corporation, it is simply the name of a firm of three persons who are carrying on business together at a particular place. It is a short name for *John Fleming, R. McIlwraith,* and *W. Nicol,* carrying on business in partnership together in *London.* The argument is that we must get rid of the names of the three individuals altogether, although the result will be to make the instrument only the joint guarantee of the three. That, I think, would not be a reasonable construction. It is the joint guarantee of the three by virtue of the signature of *Smith, Fleming, & Co.;* is that repeated over again by virtue of the separate signatures of the three partners? In my opinion, the only reasonable construction we can give to it, when we expand the signature of *Smith, Fleming, & Co.* into what it really expresses, viz., *John Fleming, R. McIlwraith,* and *W. Nicol* carrying on business in partnership together, is that the joint guarantee of the three is given by the name of *Smith, Fleming, & Co.,* and the several guarantee of each of the three is given when they repeat their signatures. Of course, it would be quite open to get rid of the effect of these separate signatures if a reason could be shewn for their being put there. The signature of *Fleming* could hardly have been added merely to express his assent to the guarantee of the firm, as he himself wrote the signature of the firm. There is no sufficient reason for rejecting that which is the fair construction of the instrument when we see who the persons really were who signed it. With regard to the

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argument that the guarantee which was promised was one in which all the five partners in *Nicol & Co.* should join, there was nothing to prevent any of the persons who had agreed to that from afterwards entering into a new contract, and the three partners who signed the second document do not say that they did so in the expectation that it would also be signed by *Maxwell* and *Hall*, and that it would not be binding on them until *Maxwell* and *Hall* also signed it.

Appeal dismissed with costs.

Solicitors for Trustee: *Lyne & Holman.*
Solicitors for Liquidators: *Clarkes, Rawlins, & Clarke.*

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[1877 N. 87.]

May 14, 21, 23.
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July 7, 8, 10, 11; *Aug.* 8.

Ship—Charterparty—Termination of Voyage—Place of Discharge named which is not in a Public Port—Obligation to provide Place of Discharge—Custom of Timber Trade.

5 QBD 163
5 App Cas 604
5 PD 265
6 App Cas 41
QBD 245
244
12 QBD 89

By a charterparty made between the Plaintiffs, who were shipowners, and the Defendant, who was a *London* merchant, it was stipulated that the steamer *E.*, belonging to the Plaintiffs, should proceed to a port on the *Baltic*, load a cargo of deal timber, and proceed to *London, S. C. Docks*, or as near thereunto as she might safely get, and deliver the same on being paid freight at a rate therein specified; the cargo to be received at port of discharge as fast as steamer could deliver as above; ten days to be allowed on demurrage over and above the laying days at £30 per day. The *S. C. Docks* are private docks adjoining the port of *London*, and the Defendant applied to the owners of the docks for a berth for unloading the ship, but was unable to obtain a berth in consequence of the crowded state of the docks. The Plaintiffs brought the ship to *London* on the 4th of August, and applied at the dock gates for admission but were refused, and accordingly moored the ship at the nearest safe place. The Defendant made no other arrangement for unloading the ship, and the Plaintiffs ultimately themselves unloaded the ship by lighters into the *S. C. Docks*: the unloading being completed on the 31st of August.

The Plaintiffs alleged that it was the custom in the *Baltic* timber trade in the port of *London* for the importers of timber to provide berths for the discharge of the cargo, and the Defendant having failed in doing so they claimed demurrage and damages for the detention of the ship:—

Held, by *Jessel*, M.R., that the alleged custom was not proved, and that, the obligation to provide a berth lying upon the Plaintiffs no less than on the Defendant, the action could not be sustained.

But *held*, by the Court of Appeal, that, the ship having been prevented from entering the *S. C. Docks* by a permanent obstacle, and the Plaintiffs having brought the ship as near as she could safely get, the Plaintiffs were entitled to demurrage and damages for detention.

The provision in a charterparty that a ship is to be brought to a particular place, "or as near thereto as she may safely get," refers to the ship being prevented from getting to her primary destination by any permanent obstacle other than an accident of navigation; not merely by an obstacle endangering her safety.

Discussion of the rights of shipowners and charterers as to unloading and demurrage under charterparties not containing the provision for an alternative place of discharge.

Affirmed by H of L 6 App Cas 38, HL

MESSRS. *NELSON, DONKIN, & CO.*, the Plaintiffs in this action, were shipowners at *Newcastle.*

The Defendant was a timber merchant carrying on business in *London,* trading under the firm of *R. H. Dahl & Co.*

By a charterparty dated the 21st of June, 1877, partly printed and partly in writing, it was agreed that the steamship *Euxine,* belonging to the Plaintiffs, should proceed to *Soderhamm,* load a cargo of deal timber from the Defendant's factors, and "being so loaded should therewith proceed to *London, Surrey Commercial Docks,* or so near thereunto as she may safely get, and be always afloat, and deliver the same on being paid freight at the rate of £2 8s. per *St. Petersburg* standard hundred for deals and battens, &c.," and with £5 gratuity in full of all port charges and pilotages. The charterparty contained (among others) the following clauses:—

"The freight to be paid on unloading and right delivery of the cargo, one-half in cash and the remainder by an approved bill on *London* at four months' date, or cash under discount at 5 per cent. per annum, or bank rate, if higher, at captain's option.

"The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above; and ten days on demurrage over and above the laying days at £30 per day payable day by day, it being agreed upon that, for the payment of all freight, dead freight, and

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demurrage, the owner shall have absolute charge and lien on the said cargo.

"The cargo to be brought to and taken from alongside the ship at merchant's risk and expense.

"If ordered to *London*, the steamer to discharge in one of the docks in the River *Thames*, the freighter to pay two-thirds of the dues."

The *Euxine* took her cargo of timber on board at *Soderhamm*, and arrived in the *Thames* on the 4th of August, 1877, and on the same day proceeded to the gate of the *Surrey Commercial Docks.*

The Plaintiffs alleged that special arrangements had to be made by importers for the reception of ships carrying cargoes of timber, and, according to the invariable custom in case of ships loaded with such cargoes, and chartered for the port of *London*, or any of the docks therein, and particularly for the *Surrey Commercial Docks*, it was the duty of the charterer to make beforehand the necessary arrangements with the dock-owner, or other person having control of the intended place of discharge, for the reception of the ship on her arrival. They also stated that, in the case of the *Surrey Commercial Docks*, the dock company required the charterer or consignee of the cargo to sign and, prior to the arrival of the ship, to deliver to them a ship order on a printed form, which the dock company supplied, addressed to the master of the ship, and directing him to take his ship to the *Surrey Commercial Docks* to discharge, and without such an order they will not admit a ship into their docks. They also require the charterer to send a specification of the cargo of the ship which is to be unloaded.

It appeared from the evidence that the Defendant, on the 15th of July, 1877, obtained and signed a printed order for the admission of the ship to the *Surrey Commercial Docks;* but the dock company refused to receive it, or to assign a berth to the ship, as the docks were quite full, and there was no probability of any room for a considerable time, perhaps for some months. He applied again on the 25th of July, and was again refused for the same reason. Consequently, on the 4th of August, when the *Euxine* was brought to the entrance of the *Surrey Commercial Docks*, the agent of the dock company refused her admittance. The

Plaintiffs alleged that this was done at the request of the Defendant, and that if he had not prevented it the dock company would have allowed the ship to lie in the dock, although they could not give her a berth for unloading. But this was denied by the Defendant.

The ship, having been refused admission into the *Surrey Commercial Docks*, was taken to the *Deptford Buoys*, in the port of *London*, which was the nearest place at which she could safely lie moored.

The Plaintiffs then applied to the Defendant to name another dock for the discharge of the cargo, but he refused to make any arrangement to discharge the cargo, except in the *Surrey Commercial Docks*, without compensation, because the reputation of those docks, and the skill of their staff in sorting timber, gave the timber a higher value than if discharged elsewhere. Consequently the Plaintiffs themselves provided lighters and discharged the cargo into them, and took them into the *Surrey Commercial Docks*. They sent in the last of the lighters on the 31st of August, 1877, but the timber was not completely landed on the wharf in the docks till the 28th of October, 1877. The Plaintiffs gave notice to the dock company of their lien for freight, charges, and demurrage, and the Defendant deposited £2000 with the dock company, and received the cargo.

The Plaintiffs claimed demurrage for ten days from the 11th of August, and damages for detention for the rest of the time occupied in the discharge of the cargo.

The Defendant, in his defence, denied that any custom existed as charged by the Plaintiffs in their claim, and insisted that even if there were such a custom it was overridden by the express terms of the charterparty. He made a counter-claim against the Plaintiffs for damage for the unreasonable stop which was put on the timber, and for injury to the timber by reason of the lighters being unfit for the delivery of the cargo.

The action came on for trial before the Master of the Rolls on the 14th of May, 1879.

Witnesses were examined by the Plaintiffs in support of the alleged custom in the port of *London* with respect to the *Baltic* timber trade; and by the Defendant to disprove such custom.

The Plaintiffs also endeavoured to prove that it was at the request of the Defendant that the dock company refused to admit the ship into the *Surrey Commercial Dock*, but in the opinion of the Court they failed to establish that fact.

Chitty, Q.C., *Cohen*, Q.C., and *Rigby*, for the Plaintiffs.

C. Russell, Q.C., *A. L. Smith*, and *R. T. Reid*, for the Defendant.

Chitty, in reply.

JESSEL, M.R.:—

As I have read the charterparty, and as I read the pleadings in this case, the Plaintiffs found their case upon an alleged custom peculiar to the *Baltic* timber trade. Reading the charterparty as an ordinary commercial document, I have no doubt as to its meaning, although, being a printed document altered in writing, the alterations have been such as not to make every word of the document quite consistent with every other word in it. That frequently happens. The bargain or contract is simply that the vessel shall proceed to *London* to the *Surrey Commercial Docks*, or as near thereunto as she may safely get, and lie always afloat to deliver the cargo on being paid freight.

Now the shipowner who enters into that bargain knows perfectly well the meaning of the words "*Surrey Commercial Docks*," and the mode in which the business of those docks is carried on. They are docks belonging to a commercial company, who carry on business for a profit as rational men. According to the ordinary usage of such bodies they are only too glad to receive vessels for the purposes of discharge when they have room to receive them, and this is perfectly notorious and known to both parties to the contract. It may happen that in a private dock of this kind, as may happen also in a public dock, that there may be such a pressure of business that the docks may be full of vessels and no vessels can get in.

In the case of a public dock, where each vessel has a right to go in in turn, the only result is that the ship must wait outside

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until it can get in. There is a little difference in the case of a private dock, because there the owners may send notice that the dock may be occupied for a long time, and they will not take in more vessels than those they have agreed to take for several weeks or months. That is the only difference between them. As I understand, the shipowner enters into this contract relying upon the practice of the dock company to receive vessels when there is room, and taking his chance of there being no room. That is the meaning of the contract independent of there being any usage.

Where is the vessel to go? She is to go to the "*Surrey Commercial Docks*, or as near thereto as she can safely get, and lie always afloat and deliver the cargo." It is quite plain therefore that going up to the dock gate will not do. She is to go inside the dock and deliver cargo, otherwise she cannot deliver at all. Therefore it is obvious if she does not go inside the dock gate she does not complete her voyage.

In my opinion she is bound to go to the place of discharge, by which I mean this, that where, by the custom of the trade, a vessel discharges cargo at a quay lying at a berth, the shipowner has no right to say, "I will remain in the middle of a large dock and put you to the expense and trouble of discharging the cargo by lighters," when the ship is to go to the quay. If it was necessary to decide it in this case, I should say the final end of the voyage is arriving at the usual place of discharge, which is the berth. It is not necessary to decide that point, because this vessel did not get into the dock.

That being so, assuming there is no fit place, and the vessel arrived at the place, and she was told there was no dock accommodation although the dock was not full, the dock company having promised all the berths of accommodation they had, so that they could not accommodate the vessel, in the ordinary course she must have waited until she could get in.

I do not see any answer to the suggestion that the contract was to take the cargo there, and that the shipowner must wait until he could get into the dock. It makes no difference whether the cause of prevention was the dock being full of vessels or some other accident,—it might have been stress of weather, or that the vessel drew more water than there was over the sill of the dock at one time,—assuming the water to flow in more at one period than at another, or it might have been an accident to the dock-gates which prevented the vessel going in for a period of time longer or shorter, as the case might be. The shipowner takes the risk of accident; so does the charterer, because in this case the charterer has to wait for his cargo. There is a risk on both sides, and the risks in some cases depend very much on the nature of the vessel. In the case of a steamer probably the risk is larger on the side of the shipowner, but not necessarily so. There may be perishable cargoes, the value of which is very variable, as the price may depend on the speed with which they are delivered on arrival at the port of discharge. Therefore both parties to the charterparty take their chance of the vessel being able to get into the dock on arrival at the place of discharge within the usual or reasonable time.

That being so, I must hold that the Plaintiffs wholly fail, unless they make out a special custom. They do allege a special custom, and I am satisfied, unless they thought they could have proved special custom or usage, we never should have heard of this case at all. They say it was the duty of the Defendant, the charterer or the consignee, to make arrangements with the dock company for the reception of the steamer, and to provide her with a proper ship order and specification, in order to enable her to enter into the docks; but he neglected or omitted either to make such arrangements or to provide such ship order and specification.

Now, as a fact, that is not proved; it is really disproved. He did not neglect anything at all. He actually sent down to the docks before the ship had arrived at the port of lading. Therefore he did it in anticipation, and then he could not get an assent on the part of the dock company to take the vessel in. They happened, by reason of previous contracts, to have had all their berths engaged for a long time, and I cannot see any notion of neglect on his part in the sense of real neglect. Of course if they mean it was a duty incumbent on him to get the vessel in, whether there was room or not, if they say there was a duty of that kind cast on him, he omitted to perform the duty. If a man contracts, either by actual contract or by that contract which usage imports into the charterparty, to provide a berth for a vessel in the

Commercial Docks, he commits a breach of that duty if he does not provide such berth. In no other sense can it be said he committed a breach of duty.

Now, is there a custom or usage in the *Baltic* wood trade which compels a charterer or receiver of the cargo to provide a berth in the named dock to receive the vessel when she arrives? That is a question of fact, and, like all other customs, it must be strictly proved. It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself.

Now I must say anything less like evidence to fulfil all these conditions than the evidence adduced in this case I have seldom seen. In the first place, this turns out to be the case, that the usage of naming a dock in the charterparty is a comparatively recent introduction, therefore really to find any custom at all we must go back to those charters which are charters to the port of *London*, or a port to be named where no dock has been named. I think those cases are undistinguishable from the case of a dock being named in the charterparty.

Then as to steamers: that again is a recent introduction into the *Baltic* timber trade. It appears from the evidence although a steamer may occasionally have been used in the trade prior to the year 1876, there was no general usage as to steamers. Therefore the steamer part of the trade is a novel introduction, and it would be very surprising to find therefore that within two years or a year and a half (there being a dispute occurring in the year 1877, the practice beginning in the year 1876) any usage can be established. That would be an unlikely thing.

Then we are driven to consider what is the usage as regards sailing vessels. It appears as a rule that a number of lay-days are allowed. But then it appears it has very seldom happened that a vessel has not got into the dock,—so seldom that most of the witnesses cannot recollect such a case at all, and the number of instances that have been adduced are exceedingly small. When those instances come to be investigated, as far as we could investigate them, the charterparty did not appear, the contents were unknown, or, where they were known, what occurred

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in fact was this: a dispute arose, communications passed between those representing the ship and those representing the cargo, and some arrangement was made by which the vessel was taken to some other dock, or was discharged by lighters in the river, or some compromise, as the witnesses called it, was arrived at, and therefore the cases do not afford any evidence. I cannot find a single case proved to my satisfaction in which the number of days during which the vessel remained outside the dock was added to the number of days she was detained in the dock, and the demurrage was calculated and paid on the excess of those days after the number of lay-days allowed by the charterparty. Not one single instance has been proved before me.

The matter does not end there. No doubt the Plaintiffs called some witnesses who testified with more or less particularity as to the existence of this usage in their opinion. On the other hand, the Defendant called many, and would have called many more had I not suggested to the leading counsel for the Defendant that he had better stop because I had heard enough,—merchants, shipowners, ship-brokers, or agents of ships, none of whom had ever heard of such a usage. They not only denied the existence of it, but they never heard of it. Some of them engaged in the largest transactions, persons of unquestioned honour and veracity, stated that until this case they never heard that such usage existed. I cannot help thinking that after that evidence it is impossible for this Court to say there is a usage of trade so well known, so clearly established, that the Court is to insert it in this charterparty against the express statement of one of the parties to it, and without any evidence of the other parties to it, that either of them contemplated such a usage at the time of the charterparty.

It is a conditional term of the contract, and it must be as clearly stablished as the rest of the contract, although it must be established by oral evidence. In my opinion, the obligation thrown on the Plaintiffs of establishing the existence of the usage has not been discharged, the case fails, and the action must be dismissed.

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From this judgment the Plaintiffs appealed. The appeal came on to be heard on the 7th of July, 1879.

Benjamin, Q.C., and *Cohen*, Q.C. (*Chitty*, Q.C., and *Rigby*, with them), for the Appellants:—

The Plaintiffs are entitled to damages for the time the ship has been detained in consequence of being unable to enter the *Surrey Commercial Docks*, which were the docks named in the charterparty. It was the duty of the charterer to provide for the due receipt of the cargo. By the general law of merchants this duty is thrown on the charterer or consignee, and that it was so in the present case is placed beyond all question by several considerations. In the first place the *Commercial Docks* are not part of the port of *London*, but private docks, which the shipowner has no power to enter without permission of the dock company. It would be absurd to suppose that it was intended that the shipowner was to make arrangements with the dock company for the admission of the ship, which had to be done long beforehand; and the evidence shews that in fact it is customary for the consignee or charterer to make the necessary arrangements. We contend that this usage amounts to an invariable custom in the *Baltic* timber trade, but even if the custom of trade is not strictly made out, there can be no doubt that such is the ordinary course of business. The particular words of this charterparty confirm this view, for it is expressly stated that the cargo is "to be received at port of discharge as fast as steamer can deliver as above"—words which clearly throw the obligation on the consignee to provide means of discharge. This the Defendant failed to do; on the contrary, he threw obstacles in the way of our getting into the dock. The ship had finished her voyage when she came to the entrance of the dock, and was refused admittance. We were bound to bring her to the port of discharge, but we were not bound to deliver till the Defendant was ready to receive the cargo. Delivery and receipt are reciprocal terms. If the Defendant could not provide a berth in the *Commercial Docks* he ought to have provided a berth in some other dock. We were not in any respect to blame for the delay. We did all we could to expedite the discharge of the cargo by delivering it by lighters.

In *Randall* v. *Lynch* (1), the vessel having got into dock, the charterer was held liable for not having provided a discharging

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(1) 2 Camp. 352.

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place. In *Tapscott* v. *Balfour* (1) it was held that when a ship had been brought into dock and could not be unloaded in consequence of the crowded state of the dock the charterer was answerable for the delay. The case is relied on against us because it was decided that if a ship had not got into the dock, though she was ready to go in, delay did not commence. But on that point it is virtually overruled by *Ashcroft* v. *Crow Orchard Colliery Company* (2). The cases establish this proposition, that when according to the charterparty goods are to be taken from alongside the ship at the charterer's risk and expense, and the ship is to proceed to a certain dock, or as near as she can safely get, and the charterer is to receive the goods as fast as the ship can discharge them, then as soon as the ship is ready to go to the place of discharge, and is delayed only because the charterer has not provided the requisite papers or found a berth, he is liable for the detention: *The Teutonia* (3); *Hill* v. *Idle* (4); *Postlethwaite* v. *Freeland* (5); *Wright* v. *New Zealand Shipping Company* (6); *Davies* v. *McVeagh* (7); *Strahan* v. *Gabriel* (8). No case can be cited against us except *Tapscott* v. *Balfour*, already noticed, and *Kell* v. *Anderson* (9). There the ship had not got near the place of discharge, and the delay was owing to a cause known to the shipowner, and of which he was presumed to have taken the risk. Here the charterparty says that the ship is to proceed to the *Surrey Commercial Docks*, it does not say into the dock, and we say that she is an arrived ship as soon as she gets to the entrance of the dock, and the duty of the charterer to have a berth ready then arises. If she is prevented by any obstacle from entering the dock she is to go as near as she safely can. *The Teutonia* shews that another port ought to be named by the charterer when delivery at the appointed place becomes impracticable. The duty of the charterer to provide means of discharge is shewn by *Erichsen* v. *Barkworth* (10), where the shipowner was held entitled to discharge in lighters at the expense of the charterer when the charterer did not discharge within a reasonable time.

(1) Law Rep. 8 C. P. 46.
(2) Ibid. 9 Q. B. 540.
(3) Ibid. 4 P. C. 171.
(4) 4 Camp. 327.
4/ (5) 4 Ex. D. 155.
(6) 4 Ex. D. 165.
(7) Ibid. 265.
(8) June 26, 1879; not reported.
(9) 10 M. & W. 498.
(10) 3 H. & N. 601, 894. 5 Jun

Charles Russell, Q.C., and *R. T. Reid* (*A. L. Smith* with them), for the Defendant :—

The Plaintiffs allege that the Defendant actively intertered to prevent the ship from getting ino the dock, but on the evidence it is clear that what the Defendant said to the dock authorities had no effect. Their refusal to admit it was solely on the ground of want of room. Then the Plaintiffs allege a custom making it the duty of the consignee to get the ship into dock. If they mean by that that it is usual for the consignee to make arrangements for that purpose, we admit that to be the case; but we deny any custom making it the legal duty of the consignee to get the order for the admission of the ship. Here the charterer did his best to get one; that is not disputed; and on the evidence it does not appear that a charterer has ever paid for delay occasioned by his failing to get it.

No legal liability to pay freight ever arose, for the right to freight does not arise till the shipowner is ready to deliver the cargo on proper terms, and here he never was ready to deliver it except on payment of demurrage, to which he has been decided not to be entitled. To entitle the shipowner to freight there must be a delivery of the cargo at the right place: *Metcalfe* v. *Britannia Ironworks Company* (1).

If a particular place is named as the place of discharge, there is nothing unreasonable in supposing that it is an absolute contract that the ship is to go to that particular dock. There were reasons in the present instance known to both parties for preferring the *Commercial Docks* to any other. The Plaintiffs knew as well as we did that it was a private dock, and ran the risk of obtaining a berth. The real question is, whether the ship had arrived at the place of destination before she entered the *Commercial Docks*. We say she had not; she was not an "arrived ship." It makes no difference whether the place of discharge is a public port or some private dock. In either case it is the *terminus ad quem* stipulated in the charterparty: *Brereton* v. *Chapman* (2); *Schilizzi* v. *Derry* (3); *Brown* v. *Johnson* (4); *Kell* v. *Anderson* (5); *Tapscott*

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(1) 2 Q. B. D. 423.

(2) 7 Bing. 559.

(3) 4 E. & B. 873. 1 Jur. N.S. 795

(4) 10 M. & W. 331.

(5) 10 M. & W. 498.

v. *Balfour* (1); *Metcalfe* v. *Britannia Ironworks Company* (2). The shipowner is bound to go to the place named unless he can shew that there is a permanent physical obstacle; there was no such permanent physical obstacle in this case: *Parker* v. *Winslow* (3); *Bastifell* v. *Lloyd* (4).

There is nothing in the charterparty in the present case to lead to a different construction. The words "to be received at port of discharge as fast as steamer can deliver as above" do not help the Defendant's case; they only mean "as fast as steamer can deliver within the terms of the charterparty." They are not equivalent to a general stipulation "to be delivered with all speed": *Thiis* v. *Byers* (5); *Steamship Company Norden* v. *Dempsey* (6). The alternative clause directing the ship to go "as near thereto as she may safely get" has no application here, for the Plaintiffs have not shewn that they could not get with safety into the specified dock.

Benjamin, in reply.

1879. Aug. 8. BRETT, L.J.:—

Charterparties, though all are, as to the majority of the stipulations in them, identical and in a common form, vary in some particulars. The description of the voyages are necessarily various. But they are always described, or ascertained by describing in terms the place where each is to begin, and the place where it is to end. And it is this invariable mode of ascertaining what the agreed voyage is which gives the key to the interpretation of the charterparty as to the time of the accruing of the liabilities as to loading and unloading. It is not invariable that the voyage or voyages which the shipowner undertakes is or are the voyage or voyages on which he is to carry cargo. As, for instance, when he undertakes to sail to a named place, and there load, and thence proceed and carry on cargo to another named place. In such case there is a voyage to the place of loading, which the shipowner undertakes to make, and with regard to which he undertakes liabilities, but on which he carries no cargo. But if the charter is made at a time when the ship is already at the place of loading, the only voyage described is the voyage on which the ship is to carry cargo. The chartered voyage is therefore not necessarily identical with the carrying voyage. Charterparties also differ in this, that in some of them lay-days and demurrage-days are specified; in others no mention is made of such days. Questions arising as to the commencement of the liability in respect of loading and unloading, and such is the question in this case, refer to, 1, the rights of the shipowners with regard thereto, 2, his liabilities, 3, the rights of the charterer, and 4, his liabilities. I will consider first the rights and liabilities of both parties as to loading. The first right of the shipowner is the right of placing his ship at the disposition of the charterer, so as to initiate the liability of the latter, whatever it may be, to take his part as to loading. In every case it seems to me that it is a condition precedent to such right of the shipowner to place his ship at the disposition of the charterer for such purpose that the ship should be at the place named in the charterparty as the place whence the carrying voyage is to begin, and that the ship should be ready to load, so far as the ship's part of the operation of loading is concerned. The place so named may give a description of a larger space, in several parts of which a ship may load, as a port or dock; or it may be the description of a limited space in which the ship must be in order to load, as a particular quay, or a particular quay berth, or a particular part of a port or dock. If when the charter is made the ship is already in the place named, the shipowner may place the ship at the disposition of the charterer as soon as the ship is ready, so far as she is concerned, to load, by giving notice thereof to the charterer. If the place named be of the larger description, as a port or dock, the notice may be given, though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but if the place named is of the more limited description, the notice cannot be given until the ship is at the named place, though the ship is in the port or dock in which the named place is situated. If the ship is not, when the charter is made, at the port or place where she is to load, the form of the charterparty is, "That the said ship, being at" (the place where she then is), "shall proceed, &c., to" (the place named as the beginning of the carrying voyage), "or so near thereunto as she can safely get, and shall there load, &c., and proceed thence, &c." In this case also the named place whence the carrying voyage is to begin, though the carrying voyage is not the whole chartered voyage, may, as before, describe a larger or more limited space. If it describes a larger place, as a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship arrives at that named place, and, so far as she is concerned, is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but, in the absence of his right to place his ship only as near to the named place as she can safely get, which is a stipulation to be discussed hereafter, he cannot place his ship at the disposition of the charterer so as to initiate the liability of the latter as to the loading until the ship is at the named place, or the place which by custom is considered to be intended by the name; as, if a larger port be named, the usual place in it at which loading ships lie. If it describes a more limited place, as a quay or quay berth, or a particular part of a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship is arrived at that place ready, so far as she is concerned, to load, but not until the ship is at that place. The further right of the shipowner as to the loading is, of course, his right to insist on the liability of the charterer, whatever that may be, which attaches when and after the ship is duly placed at his disposition. The liability of the shipowner as to the commencement of the loading depends on the particular form by which he has bound himself to place his ship at the disposition of the charterer for that purpose. He must do so "with all convenient speed," or "with all possible despatch," or "immediately, unless prevented by enumerated accidents," or "within a reasonable time," according to his agreement in each case. If he fails to satisfy this liability an action may be maintained against him—as, for instance, an action for a deviation in the preliminary voyage.

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(1) Law Rep. 8 C. P. 46.
(2) 2 Q. B. D. 423.
(3) 7 E. & B. 942. 4 Jur ns 584
(4) 1 H. & C. 388.
(5) 1 Q. B. D. 244.
(6) 1 C. P. D. 654.

The primary right of the charterer as to the loading under a charterparty in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charterparty as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer, has notice of both these facts; when these conditions are fulfilled the liability of the charterer begins. The extent of that liability depends on the form as to it of the charterparty. If there be no undertaking that he will load the ship at all events within a specified time, he will be bound to use reasonable diligence to do his part towards the loading according to the terms or meaning of the charterparty; that is to say, "with all possible despatch," or "with usual despatch," or "with the customary despatch of the port," or "within a reasonable time." But whenever in the charterparty it is agreed that a specified number of days shall be allowed for loading, and that it shall be lawful for the freighter to detain the vessel for that purpose a further specified time on payment of a daily sum, this constitutes a stipulation on the part of the freighter that he will not detain the ship for the purpose of loading beyond those two specified periods. This is the principle laid down in *Ford* v. *Cotesworth* (1). If the ship in such case is detained beyond the specified lay-days, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in loading has occurred from causes wholly beyond the charterer's control.

The rights and liabilities of the shipowner and charterer as to unloading under a charterparty in ordinary terms are very much the same as, though they are not identical, with these respective rights and liabilities as to loading. The right of the shipowner is that the liability of the charterer as to his part of the joint act of unloading should accrue as soon as the ship is in the place named as that at which the carrying voyage is to end; and the ship is ready so far as she is concerned to unload. The shipowner, however, is not bound to give notice that his ship is so arrived and is so ready. If the named place describes as before a large space in several parts of which a ship can unload, as a port or dock, the shipowner's right to have the charterer's liability initiate commences as soon as the ship is arrived at the named place, or the place which by custom is considered to be intended by the name, and is ready, so far as the ship is concerned, to discharge, though she is not in the particular part of the port or dock in which the particular cargo is to be discharged. But in the absence of his right to place the ship only as near to the named place as she can safely get, the shipowner's right to have the charterer's liability to unload initiate, does not commence until the ship is in the named place. The liability of the shipowner as to the commencement of the unloading is to use all reasonable despatch to bring the ship to the named place where the carrying voyage is to end, unless prevented by excepted perils, and when the ship is there arrived, to have her ready with all reasonable despatch to discharge in the usual or stipulated manner. If the named place describes a more limited space, as a quay, then the right of the shipowner to have the liability of the charterer initiate does not commence until the ship is at the named place, although the ship is in the port, or dock, or larger space in which the named place is situated. The primary right of the charterer as to unloading is similar to his primary right as to loading, namely, that he cannot be under any liability as to unloading until the ship is at the place named in the charterparty as the place where the carrying voyage is to end, and the ship is ready so far as she is concerned to discharge; or, if the necessary conditions are fulfilled, he may, as a substituted liability, be liable when the ship is as near to the named place as she can safely get. But when the ship is at the named place, or the substituted place, and is ready to discharge, the liability of the charterer as to the unloading commences. And here again the extent of his liability depends on the form as to it of the charterparty. If there be no undertaking that he will discharge the ship at all events within a specified, that is to say, a described time, he will be bound to use reasonable diligence to do his part towards the unloading, according to the terms or meaning of the charterparty. That may be "with all possible despatch," or "with usual despatch," or "with the customary despatch of the port," or "within a reasonable time." But if there be a stipulation, express or implied, on the part of the charterer that he will not detain the ship for the purpose of unloading beyond a specified time (and there is such a stipulation when lay-days are allowed for unloading and demurrage-days on payment of a daily sum), and if the ship be in fact detained beyond the lay-days after she has arrived at the place named for the end of the carrying voyage, and is there ready so far as she is concerned to unload, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in unloading has occurred from causes wholly beyond the charterer's control. In either form of naming the places at which the voyage is to begin and end, it follows from the very form of the agreement, which fixes what the voyage is by naming the places at which it is to begin and end, that the carrying voyage does not begin until the ship is at the place named as the place where it is to begin, and the carrying voyage does not end until the ship is at the place named as that where the voyage is to end. It would be a contradiction of the whole substance of the contract to carry on a voyage, to say that the charterer is bound to load before the ship is at the place whence the goods are to be carried, or that the charterer is bound to receive the cargo before the shipowner has carried it to the end of the voyage for which he is paid to carry it.

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(1) Law Rep. 4 Q. B. 127; Ibid. 5 Q. B. 544.

These statements of the law seem to me to be also consistent with and to be the result of all the cases. In *Randall* v. *Lynch* (1) the description of the carrying voyage was as to the ending of it "to proceed direct to the said port of *London*, and upon arrival there, that is to say at the *London Docks*, to make discharge and faithful delivery of the said homeward cargo, &c., and there end and complete both out and homeward voyages." The ship arrived in the *London Docks*, but on account of the crowded state of the docks was delayed in discharging. The first part of the judgment of Lord *Ellenborough* is, "I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to her owner. He is responsible for all the varied vicissitudes which may prevent him from doing so." This part of the judgment obviously gives no intimation as to when the end of the stipulated time arrives. It only states what is the liability when the end arrives. But when lay-days are allowed, the end of the stipulated time depends on the time when the liability to unload commences. That time is expressed later in the judgment. "When she was brought into the docks," says Lord *Ellenborough*, "all had been done which depended on the

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(1) 2 Camp. 352.

Plaintiff," the shipowner. That is to say, the lay-days began when she was brought into the docks; so the case has always been construed. *Brereton* v. *Chapman* (1) only decides that where a large port, as *Wells*, is named, the vessel must have arrived, not merely at the entrance or in the port, but at the usual place for discharging vessels which arrive in the port to be discharged. *Kell* v. *Anderson* (2) is as to that same point, the named port being *London*. In *Brown* v. *Johnson* (3) the charter is to proceed to a port in the *United Kingdom*, fifteen days for discharging and thirty days for demurrage. The ship was afterwards ordered to *Hull*. The ship arrived in port on the 1st of February, in dock on the 2nd, but did not get into a place of unloading in the dock until the 4th, in consequence of the full state of the docks. *Alderson*, B., ruled that the period from which the lay-days was to commence was the day of her coming into dock, and not of her coming to her berth in the dock. And that ruling was upheld by Lord *Abinger* on the authority, he said, of *Randall* v. *Lynch* (4) and *Brereton* v. *Chapman*. It must have been assumed or proved that the usual place of unloading all ships in the port of *Hull* was in a dock.

In *Ford* v. *Cotesworth* (5) the charter was that the ship "shall proceed to *Lima*, and there, or so near thereto as she may safely get, deliver the cargo in the usual and customary manner, and so end the voyage." No lay-days or days on demurrage were named. The ship arrived at *Calao*, the port of *Lima*, and was ready to discharge. The authorities refused to allow the cargo to be unloaded for seven days: Judgment for Defendants. *Blackburn*, J., said, "Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause over which he has no control prevents him from performing what he has undertaken within that time he is responsible for the damage. But where the act to be

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(1) 7 Bing. 559.

(2) 10 M. & W. 498.

(3) 10 M. & W. 331.

(4) 2 Camp. 352.

(5) Law Rep. 4 Q. B. 127, 133, 135.

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done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect either expressed by the parties or to be collected from what they have expressed, the damage arising from an unforeseen impediment is to be cast by law on the one party more than on the other; and consequently we think that what is implied by law in such a case is, not that either party contracts that it shall be done within either a fixed or a reasonable time, but that each contracts that he shall use reasonable diligence in performing his part." But he adds, "Whenever in the charterparty it is agreed that a specified number of days shall be allowed for unloading, and that it shall be lawful for the freighter to detain the vessel for that purpose a further specified time, on payment of a daily sum, this constitutes a stipulation on the part of the freighter that he will not detain her beyond those two specified periods."

The case throws no light upon the question as to when lay-days are to commence. Whatever the extent of the charterer's liability was, the question as to its extent arose with regard to delays which happened after the ship was at *Lima*. The only question decided was, that where no lay-days are mentioned, and there is no other stipulation binding the shipowner or charterer to load or discharge the ship at all events within a given time, their reciprocal liabilities are only to use their best endeavours to load or discharge within a reasonable time. This appears clearly from what was said in *Thiis* v. *Byers* (1). The charter was "to a safe port in the *United Kingdom*, to be discharged in fourteen days, ten days on demurrage." The ship was ordered to and arrived at *Middlesborough*. In the course of unloading bad weather intervened and, without any default of the charterer, the ship was detained beyond the lay-days. It was argued that the charterer was not liable because he had used his best endeavours, and *Ford* v. *Cotesworth* (2) was cited. "In that case," said *Blackburn*, J., "no lays days for unloading were stipulated." In *Tapscott* v. *Balfour* (3) the charter was "to proceed direct to any *Liverpool* or *Birkenhead* dock as ordered by charterer, and there load in the usual and

(1) 1 Q. B. D. 244.
(2) Law Rep. 4 Q. B. 127, 133, 135.
(3) Law Rep. 8 C. P. 46.

customary manner a full and complete cargo of coals. The cargo to be loaded as customary at the average rate of 40 tons per working day, and freighters to pay demurrage at the rate of 4*d.* per ton register per diem." The vessel was ordered to the *Wellington Dock, Liverpool.* The vessel arrived at *Liverpool.* An order was obtained on the 29th of June to admit the vessel into dock. She was not permitted by the authorities to go into the *Wellington Dock* until the 11th of July, but on that day she went into the dock. She was not permitted to go under the spout until the 29th of July. *Bovill,* C.J., and *Denman,* J., held that the lay-days commenced on the day the ship entered the dock, and that the charterer was liable for subsequent delay beyond the lay-days. The rule, it was said, is, that where a port is named in the charterparty as the port to which the vessel is to proceed the lay-days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. And *Bovill,* C.J., took notice that the stipulation relied on in argument to vary this general rule was in that case not a stipulation to load "with the customary or the usual despatch," but to load "in the usual or customary manner," and that, he said, referred to the mode of delivery and not to the time of delivery. And surely he was right. In *Ashcroft* v. *Crow Orchard Colliery Company* (1) the charter seems to have been made whilst the ship was in the port of *Liverpool* though not in dock. The whole charter is not given. As described in the judgment, no mention is made of *Liverpool* at all. There it is said that "by the charterparty dated *Liverpool* the master engaged to receive and load a full and complete cargo of coal and proceed to *Belfast,* &c., to be loaded with the usual despatch of the port. By a memorandum at the foot the vessel was to load in the *Bramley Moore* or *Wellington Docks.*" But in the head-note it is said that "by charterparty the master engaged to receive on board and load a cargo of coal 'at the port of *Liverpool.*'" If those words were in the charterparty they described the place from which the carrying voyage was to begin, and the stipulations as to the dock were only as to the particular part of the named place, *i.e.*, the port of *Liverpool* in which the loading was to take place. If this view of the terms of that charter be correct the decision is strictly in accordance with all former cases. I cannot but think it is correct, or was so assumed, for the judgment states that the contention of the Defendant's counsel was that the words "to be loaded with the usual despatch of the port" applied only to a delay in the process of loading when the vessel had arrived at the berth. "But we are of opinion," says the Judge, "that the obligation goes further and covers the whole period from the time when the vessel at the port is placed at the disposal of the charterer there in a condition to receive her cargo." If the place named was the port, that is consistent with all the previous cases. It should be observed also that the Court held that there was an absolute contract by the charterers that the vessel should be loaded with the usual despatch of the port. But in the charterparty as reported there are no lay-days or days on demurrage given for loading, so that if the charterparty is correctly set out, and if the decision be supposed to be other than one as to the extent of the liabilities, and not as to the time when it was to begin, or as a decision on the particular covenants in that charterparty, and on the particular facts of that case, it is in direct conflict with *Ford* v. *Cotesworth* (1). It is sufficient surely to say, without in the least questioning the correctness of the decision, that it is not a decision as to the time when the liability of a charterer as to loading or unloading is to begin to attach. In *Tapscott* v. *Balfour* (2) the stipulation was to load "in the usual and customary manner." In *Ashcroft* v. *Crow Orchard Colliery Company* (3) the stipulation was that the vessel was to be loaded "with the usual despatch of the port." Both decisions were independent of the questions as to what was the time at which the liability was to accrue. I cannot see that the two cases are in conflict. I cannot believe that *Ashcroft* v. *Crow Orchard Colliery Company* was intended to overrule any previous case as to the period from which lay-days are to commence to run at a place of discharge. Neither of the cases tried before me which were cited differ from the rule I have enunciated as to this point. In *Strahan* v.

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(1) Law Rep. 9 Q. B. 540, 543.

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(1) Law Rep. 4 Q. B. 127.
(2) Law Rep. 8 C. P. 46.
(3) Law Rep. 9 Q. B. 540.

Gabriel (1), tried at *Newcastle*, the named place was a quay. The ship arrived and found the only quay berth occupied by another ship. The shipowner offered to discharge across the ship which occupied the quay berth, if the charterer would pay for the stage and labour. The charterer refused. The shipowner claimed demurrage. I held that the lay-days did not commence to run until the Plaintiff's ship was alongside the quay, the quay being the place named whereat the voyage was to end. In *Davies* v. *McVeagh* (2), tried at *Liverpool*, the place named was the *Wellington Dock*. The ship was on a certain day admitted into the *Wellington* half-tide basin, but was refused admission for a considerable time into the *Wellington Dock* because the loading berths therein were full. The evidence given, and I have referred to my notes for the purpose, was in terms that there were gates to the half-tide basin from the river, and that at *Liverpool* the half-tide basin was always treated as part of the *Wellington* and *Bramley Moore Docks*. It was not argued that it was not, but only that the liability of the charterer did not initiate until the ship was at the high level in *Wellington Dock*, which was the place of loading. I held that the lay-days began to run when the ship was admitted into the dock, *i.e.*, the half-tide basin. I held that it was the dock in consequence of the evidence. The dispute was only whether the liability commenced when the ship was in the dock, or when she was at a loading berth. I ruled upon that dispute. Nobody suggested the ship was not in dock.

Upon this review then of cases it seems to me that since *Randall* v. *Lynch* (3) all the cases recognise the doctrine that where lay-days are allowed they begin to run when the ship is in the place named in the charterparty as that whence the carrying voyage is to begin, or where that voyage is to end, and that they do not begin until then. And that proposition put into more general words is, that upon a charterparty in ordinary form the shipowner's right to place his ship at the disposition of the charterer so as to initiate the liability of the charterer either as to loading or discharging the ship, and the reciprocal commencement of the liability of the charterer either as to loading or discharging the ship, do not commence until the ship is in the place named as that whence the carrying voyage is to begin or where the carrying voyage is to end.

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(1) 26th June, 1879; not reported.

(2) 4 Ex. D. 265.

(3) 2 Camp. 352.

Unless, therefore, the shipowner in the present case can maintain that he had a right to call upon the charterer to take delivery, not in the *Surrey Commercial Dock*, but at a place so near thereunto as the ship could safely get, I am of opinion that he cannot maintain the action for any part of the demurrage, or any part of the damages which he has claimed. At the hearing before the Master of the Rolls it was contended that the shipowner was in this case prevented from obtaining admittance into the *Surrey Commercial Docks* by the act of the charterer. If that had been proved I should have thought the shipowner was entitled to damages on that ground as for a wrongful act preventing the shipowner from carrying out his contract with the charterer. But the assertion was not supported by the evidence. A long and persistent endeavour was made to prove that by a binding custom of the port of *London* with regard to timber ships importing timber from the *Baltic*, the charterer who was an importer undertook absolutely to obtain the admission of the ship into the dock. The meaning being, that by the custom if he did not, he was, according to the understanding of all shipowners and importing charterers in that trade, liable to pay damages in the nature of demurrage. I entirely agree with the Master of the Rolls that no such custom was proved.

Another ground of liability was urged before us upon a suggestion of Lord Justice *James*, which was, that under the circumstances of this case the shipowner was entitled to call upon the charterer to take delivery at a place as near to the docks as the ship could safely get. That ground for liability does not seem to me to have been urged by any one before the Master of the Rolls. It was there suggested that if the place named in the charterparty was a private dock or quay, there arose an implied obligation from that fact alone binding the charterer to obtain admittance for the ship into that dock or to that quay. With the greatest deference I cannot accede to that view. In the first place it contravenes what I apprehend to be the received interpretation of a well-known mercantile document, namely, a charterparty, which is, as I have stated, that the reciprocal rights and liability do not accrue

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until the ship is at the named place. In the second place the hypothesis seems to me to violate the principle laid down in *Ford* v. *Cotesworth* (1), that where the act to be accomplished is to be brought about by the joint effort of both parties, the only implication, in the absence of an express contract to the contrary, is that each will use his best endeavours to forward the accomplishment of the common object. It may be in such case that both shipowner and charterer would be bound to use their best endeavours to obtain access to the dock or quay, but no more. And if so, the Defendant in this case did use his best endeavours. But liability on the other ground seems to be sufficiently asserted in the statement of claim, and to be raised by the evidence. It seems to me to be proved by the evidence that the ship was prevented from entering the *Surrey Commercial Docks* solely by the action of the proprietors of those docks, and without any default of the Defendant, the charterer, and notwithstanding every effort of the Plaintiffs, the shipowners, to obtain admission. And it appears to me to be proved that the causes of the refusal of the dock proprietors and their refusal would have inevitably lasted for many months, for more than six months. Upon the one side it is said that this refusal, which would have inevitably existed for so long a time, made it impossible, within the meaning of the charterparty, that the ship could enter the dock, and therefore she was only bound to go "as near thereunto as she could safely get," and being so near, was entitled to say that the ship had arrived within the terms of the charterparty at the end of the carrying voyage, and was, therefore, entitled to call upon the charterer to take delivery at that place; and on the other side it was said that a ship is not entitled to rely upon being as near to the named place of destination as she can safely get, unless she is prevented by some physical cause existing in the named place, and unless such cause be permanent, and that in the present case there was no physical cause existing in the docks which made them unsafe for the ship, and if a disability to enter the docks arising from other than a physical cause might suffice if it were permanent, the cause in this case was not sufficiently permanent. I am not aware of any case having been decided under this head, except where the cause was physical. But where the cause has been physical it has been often decided that if the obstacle was only temporary it was not, however complete for the time, sufficient to enable the shipowner to insist on the substituted or alternative place of delivery. This has been decided in *Schilizzi* v. *Derry* (1), and in *Bastifell* v. *Lloyd* (2). The term used has been that the obstacle must be "permanent." I think it is dangerous to depart from a recognised judicial phraseology. But the phrase must have a practical interpretation, just as the term "impossible" was interpreted by Mr. Justice *Maule*. By analogy I should say that "permanent," as used in the cases on this subject, means that it is an obstacle which cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the objects of the adventure of both charterer and shipowner, is as a matter of business wholly unreasonable. I think notice must be taken of what the particular adventure in each case is. As, for instance, whether the voyage be to seas periodically frozen, or to such ports as *London* or *New York*. In the one case a much longer possible delay must be anticipated by both parties to the adventure than in the other. As to the question whether the obstacle must be physical, it depends upon what is the expressed or unexpressed condition to be implied from the stipulation, "or so near thereunto as she can safely get." Is it if the ship cannot get with safety to the place primarily named? or is it if the ship cannot get to the place primarily named? It seems to me, on consideration, that the sensible implication is, if the ship cannot get to the place primarily named. There is as much reason why the delivery and acceptance of the cargo should take place at the substituted place, if the ship cannot arrive at the place primarily named for any other reason, as if she cannot arrive there with safety to herself.

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(1) Law Rep. 4 Q. B. 127.

6 App Cas 59

The proposition, then, in such case is, that lay-days do not begin to run, either for the purpose of loading or unloading, until the shipowner has brought his ship to the primary destination named in the charterparty, so as to be ready, so far as the ship is concerned, to receive or deliver there, unless he is prevented from getting his ship to that destination by some obstruction or

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(1) 4 E. & B. 873. 1 Jur NS 795. (2) 1 H. & C. 388.

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disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the object of the adventure of both the shipowner and charterer, is as a matter of business wholly unreasonable. If there be such an obstruction or disability, the lay-days begin when the shipowner has brought his ship to a place so near to the primary place of destination as the ship can be brought with safety to the ship and cargo, and so as to be ready, so far as the ship is concerned, to deliver there. In the present case there was such a disability as is described in the above proposition, and it was permanent in the sense expressed. Consequently, in this case the charterer was bound to assist in the discharge of the cargo at the place where the ship lay near the *Surrey Commercial Docks*, and upon his neglect and refusal so to do was liable for the damages thereby caused to the Plaintiffs.

Cotton, L.J.:—

This is an appeal from an order of the Master of the Rolls dismissing the action. The action was by the owners of the steamship *Euxine* to recover from the Defendant, as charterer of that vessel, freight and demurrage. There is no dispute about freight, for although the Master of the Rolls dismissed the action, he did so on an undertaking of the Defendant to pay the freight.

Although in terms the statement of claim asks for demurrage, in substance the claim is for damages for the neglect or refusal of the Defendant to accept delivery of the cargo, and thereby detaining the Plaintiffs' vessel and subjecting the Plaintiffs to divers charges and expenses in respect of the ship and cargo.

Under the charterparty, which was dated the 21st of June, 1877, the ship was to go to *Soderhamm*, and there load a cargo of deals. [His Lordship read the material parts of the charterparty, and continued:—]

The ship arrived at *Soderhamm*, and between the 21st and 28th of July shipped the cargo of deals and arrived in the river on the 4th of the following August. It appears that the *Surrey Commercial Docks* are in the habit of sending to merchants and others printed forms. These purport to be addressed to the captain of a ship to be named, and contain a direction to him to take the ship into the docks, which is to be signed by the consignees. There then follows a statement of the place where the consignee wishes the cargo to be stowed, and there is subjoined a notice relating to the different entrances to the docks, and a note that the vessel will not be docked at any other lock than that stamped thereon. The lock is the entrance from the river into the docks. It appears that when a consignee or charterer desires that the cargo of a steamer should be unloaded in the *Surrey Commercial Docks* he makes arrangements with the dock company for an unloading berth for the ship, and sends to them one of the papers filled up so as to suit the particular case ; and, further, that if the dock company are able to provide accommodation for the vessel, they are accustomed to stamp the document so filled up with the name of the lock by which it is to be admitted into the docks, and send it to *Gravesend* to be delivered by their agent there to the captain on his arrival. The document thus filled up and stamped becomes a direction to the captain, if no dock has been mentioned in the charterparty, to go to the *Surrey Commercial Docks,* and whether the dock has been named in the charterparty or not, a direction to enter the docks by a particular lock, and it is a direction to the dock master to admit the vessel. The Defendant, on the 16th of July, endeavoured to obtain for the *Euxine* an unloading berth in the *Surrey Commercial Docks,* and with that view sent to the dock company one of the documents above mentioned. But the dock company had made arrangements for unloading so many steamers laden with deals that they were unable to provide an unloading berth for the *Euxine,* and declined to stamp the document or to send it to the ship at *Gravesend.* On the 4th of August the ship went to one of the entrances of the *Surrey Commercial Docks* in order to enter the dock, but when at the point of entering the dock gates it was turned back by the dock master and was moored near the entrance to the dock. A subsequent attempt was made by the captain and agents of the vessel to obtain admission into the docks, but the officers of the dock company refused admittance, and did so because they were unable to provide an unloading berth for the steamer. On each occasion there was room for the vessel to enter and be moored in the dock if the officers of the company would have allowed it to enter the dock gates. The Plaintiffs contended that the Defendant had actively interfered and prevented the dock company from admitting the *Euxine* into their dock. But in my opinion this was not established. The first refusal of the dock company to admit the *Euxine* into the dock was at a time when the Defendant was doing his best to induce the dock company to provide an unloading berth for the ship; and although the secretary of the dock company did at the instance of the Defendant telegraph to the dock master not to admit the ship into the dock, this telegram was a mere repetition of orders previously given. Subsequently, the captain and agent of the ship requested the Defendant to make arrangements for unloading the ship in some other dock, which the Defendant then had an opportunity of doing. He, however, refused to do so, and required the captain to discharge his cargo in the *Surrey Commercial Docks*, and as he was unable to obtain admission into those docks, he after some delay unloaded the cargo into lighters, which ultimately landed the cargo in the *Surrey Commercial Docks*.

Under the circumstances the ship was detained for a considerable time longer than would have been occupied in discharging its cargo if it had been received into the *Commercial Docks* and there unloaded with the usual steam despatch of those docks, or than would have been occupied in discharging the cargo if the Defendant had been ready and willing to accept delivery of the cargo as soon as the vessel, after having failed to obtain admission into the dock, was moored in the river and ready to deliver its cargo there.

It has been arranged between the parties that if we shall be of opinion that the Defendant is liable to the Plaintiffs for detention of their vessel, the amount of damages shall be ascertained out of Court.

As a general rule, the time within which the charterer or consignee is bound to accept delivery of a cargo does not begin to run till the ship has arrived at the stipulated place of discharge, and is ready there to begin to discharge her cargo, and the first point to be considered in the present case is, whether the *Euxine* ever did arrive at a place of discharge stipulated for by the charterparty. The words are, "shall therewith proceed to *London*,

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Surrey Commercial Docks, or so near thereto as she may safely get and lie always afloat, and deliver the same." I am of opinion that the ship never did arrive at the *Surrey Commercial Docks* within the meaning of this stipulation. For although she arrived at one of the entrances to those docks, she never entered the docks, and, in my opinion, the contention of the Defendant was correct, as the meaning of the charter is, that the ship should go into, and not merely to the entrance of, the docks. The question remains, did she go to the alternative place of discharge? It was argued on behalf of the Defendant that the alternative was intended to provide for the accident of the vessel being unable to get to the primary place of discharge in consequence of some permanent obstruction endangering the safety of the ship. Undoubtedly the alternative applies to and includes such a case, but the reference to the safety of the ship in the alternative clause is, in my opinion, introduced to shew what the alternative place of discharge is to be, not to shew when the alternative is to arise. In my opinion there is neither authority nor principle for holding that danger to the ship is the only event for which the alternative provides, and although expressions of Judges may be found to the effect that the alternative was intended to provide for such a case, they must, in my opinion, be taken with reference to the cases in which they were used, and not as restricting the operation of the clause to that one case. In the present case we must construe the charterparty according to the facts known to both parties. On the evidence—and for this purpose it is sufficient to refer to that of the Defendant's witness, Sir *Thomas Gabriel*—it appears that it is the practice for the charterer or consignee to go to the docks to make arrangements for admission of the vessel into the dock. It also appears that the dock was a private one, that is to say, that the dock company claimed the right to exclude any vessel which it was not for their interest to admit into their dock. The ship failed to obtain admission into the dock in consequence of the Defendant having been unable to obtain a discharging berth for her. I think this charterparty may be construed as if the alternative place of discharge were allowed in case the dock company, from inability of the charterer to obtain a discharging berth, declines to admit the ship into the dock, and that con-

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sequently, subject to an objection which I shall mention, the ship, when she, after having been refused admission to the dock, anchored in the river, and was ready there to discharge her cargo, had arrived at the alternative place of discharge allowed by the charterparty, and that at least from that time the Defendant is liable for any delay in accepting delivery of the cargo. But it is said that the ship might have waited for its turn to go into the dock, and therefore that, even if the provision for an alternative place of discharge could, under any circumstances, apply to the case of such an obstruction as existed in the present case, it cannot, under the circumstances of this case, do so, because the obstruction was temporary only, and not of a permanent character. In support of this argument, cases were referred to where the owner of the ship was held not to be excused for not going to the primary place of discharge in consequence of its having been impossible so to do for a considerable time, as in *Parker* v. *Winslow* (1) and *Bastifell* v. *Lloyd* (2), in each of which cases the delay was for about a fortnight. But in each of these cases the access to the place of discharge was prevented by the state of the tide in the port, which must be considered as one of the usual accidents of navigation, which is a risk to be undertaken by the ship. In the present case the vessel had practically arrived at the end of the highway which formed the access to the place of discharge, and her inability to enter the dock was not owing to any difficulty of navigation. It was attributable solely to the refusal of the officers of the dock company to admit her; and in my opinion on this contract the only question is, whether the obstruction to her entering the docks is to be considered of a temporary or of a permanent nature. I think that an obstruction must be considered a permanent one which cannot be removed in a time which is reasonable, having regard to the interests of the shipowner and of the consignee; and such, in my opinion, was the obstruction in the present case, for the evidence was that the dock company would not admit the steamship unless an unloading berth could be provided for her, and that they would have been unable to provide an unloading berth for the *Euxine* for at least a month, probably for some months. This, in my opinion, must be considered a permanent and not a merely temporary obstruction to the admission of the ship into the docks.

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(1) 7 E. & B. 942. 4 Jur NS 84

(2) 1 H. & C. 388.

In my opinion, therefore, the ship, when moored in the river ready to discharge her cargo, was entitled to say that she had arrived at the alternative place of discharge, and could require the Defendant to accept delivery of the cargo. But, independently of the question whether the ship had arrived at a place of discharge mentioned in the charterparty, I am of opinion that under the circumstances of this case the Plaintiffs are entitled to recover. For it is proved that it is in fact the practice of the charterer or consignee to make arrangements for an unloading berth. The contract was made with reference to this state of things, and in it there is the stipulation that the cargo was to be received at the port of discharge "as fast as steamer can deliver." It was urged that this proviso only applied when and if the ship was in the *Surrey Commercial Docks*. I think it may fairly be construed as a stipulation by the charterer that the vessel shall, as far as he is concerned, be unloaded with the despatch of a steamer having the usual means of unloading in use in the *Surrey Commercial Docks*. It was solely in consequence of the inability of the consignee to obtain an unloading berth in the *Surrey Commercial Docks* that the ship was refused admittance into the dock. The ship was at the very entrance of the dock, ready to enter and to be put under the orders of the consignee for discharge. That it did not enter the dock was not attributable to any difficulty of navigation or to any default on the part of the ship. In this case, as from the time when the ship was ready to enter the dock, the case as between the shipowner and consignee must be dealt with as if the ship had been in the dock, and the delay, if any, must, in my opinion, be considered as that of the charterer, for which the owner is entitled to claim compensation in damages.

This view is strongly supported by the judgment of Lord Justice *Bramwell* in *Davies* v. *McVeagh* (1). It was pressed upon us that a decision in favour of the Plaintiffs in this case would be at variance with the decision in *Tapscott* v. *Balfour* (2). That case may be distinguished from the present by the stipulation in the present charterparty, that the cargo was to be received at port of discharge as fast as steamer could deliver. Apparently there was not any similar provision in that case, and in the subsequent case of *Ashcroft* v. *Crow Orchard Colliery Company* (1)—a case the circumstances of which were very similar to that of *Tapscott* v. *Balfour* (2)—the Court, in deciding in favour of the shipowner, relied on a stipulation in the charterparty that the vessel was to be loaded with the usual despatch of the port, which is very similar to the stipulation in the present case to which I have referred. Certainly the present case more resembles that in the Queen's Bench than the previous decision in the Court of Common Pleas. In my opinion the Court, in *Tapscott* v. *Balfour*, did not intend to lay down a general rule that where the place of discharge is a private wharf or dock, and the inability of the ship to get to such a place of discharge is attributable to an omission or inability of the charterer to provide the means of discharge for the ships there which it is usual for him to provide, in such a case the ship and not the charterer is to bear the loss.

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(1) 4 Ex. D. 265.

(2) Law Rep. 8 C. P. 46.

JAMES, L.J.:—

I concur generally in the judgment of the Lord Justice *Cotton*.

It appears to me that for the determination of the present question between the parties the contract between them may be read as if expressed in ordinary Queen's English, and not in the peculiar dialect of charterparties, and may be construed according to general legal principles, and not according to any peculiar usage either maritime or commercial.

Now in this case the charterer, the Defendant, hired the Plaintiffs' ship to proceed to a *Baltic* port, and there load from the factors of the merchant a full and complete cargo of deals, &c., and being so loaded, to proceed to *London, Surrey Commercial Docks*, or as near thereto as she may safely get, and lie always afloat, and deliver the same at a certain freight, with £5 gratuity in full of all port dues and pilotages. There was the usual exception of the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and steam navigation.

It was proved by the Defendant's witnesses that the *Surrey Commercial Dock* was a private speculation and undertaking, the proprietors of which had and exercised the right to grant or refuse admission to any vessel at their sole will and pleasure. As a matter of fact, therefore, the *Surrey Commercial Dock* was a private close, to which there was access through their private gates from the port of *London*, but was outside of and no part of such port, that is to say, the water surface of the dock was no part of the public highway of the port. I hold it to be a matter of general law that when one man hires another to do something in a private close, his own or another's, there is, in the absence of express or implied stipulation or exception, a grant or a warranty of the requisite right of ingress, egress, and regress to and from such close to enable the hired man to do the work. But where the close is not strictly a private close, but one which both parties know to be the close of another whose ordinary business it is to allow access for his own profit, and whom it ordinarily suits to give such access to any one willing to pay for it, what is the reasonable implication as to such access? Is it reasonable to imply that the hired man binds himself that the owner of the close will permit such access, and to hold that, through the act of such owner in refusing such access, the contract is broken by the hired man? Is it, on the other hand, reasonable to imply that the hirer binds himself absolutely to procure such access, and breaks his contract if without any default of his own he fails? Supposing that the close being a dock, as in the present case, the dock walls had given way, and the dock company had been insolvent and wound up and unable to repair them, would that be a failure of the ship to complete its voyage? Would that be a default of the merchant preventing such completion? I cannot myself think that either alternative would be the true answer, and I think that there would be *in gremio contractus* implied some such alternative as that which is actually expressed in the ordinary printed form of charterparties. And I approach the construction of that clause in the charterparty with this conviction, that no sensible shipowner and no sensible merchant would be contracting for the continued existence or physical fitness of the dock, or for the continued existence of the joint stock company, its owners, or for the readiness and willingness of the latter to open their gates.

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(1) Law Rep. 9 Q. B. 540.

(2) Law Rep. 8 C. P. 46.

I read the clause thus: "Shall proceed to the port of *London* and discharge in the *Surrey Commercial Docks*, or if she cannot from any physical or legal obstruction or other cause not being an accident of sea or river (which the ship takes on herself) get into such dock, then she is to go so near thereto as she can get, and as she can so get and lie with safety and always afloat."

That this is the true construction (so far at least as it is favourable to the shipowner) appears to me to be strengthened by this, that the printed common forms, one of which was used on the present occasion, are adapted for the case of a port not named but to be named, and contain the following clause applicable thereto, and which still remains in the print: "If ordered to *London*, the steamer to discharge in one of the docks in the River *Thames*." That means a dock to be named by the charterer. Now could it be reasonably held that under such a charterparty as that the charterer could select and name a dock which he knew would not admit the ship for months, and so compel the ship to remain as a floating warehouse for him during those months? But what is the difference in point of legal construction and effect between such a charterparty completed by subsequently naming the port and dock and a charterparty originally containing the names of both?

Adopting the construction which I think the grammatical and reasonable one of the alternative clause, I next inquire what is the practical effect of it? A ship, in my view of it, is not prevented from getting in if there be only a temporary delay or casual obstruction, such an accident as may be expected in the ordinary course of affairs. Supposing, for example, she had to wait her turn while some other ships were going through the dock, or to wait for a few hours, or a few tides, while some ships were being removed from their berths; supposing, for another example, that a ship had foundered in the lock or at the entrance, and that the obstruction was being removed and would be removed in a few hours, or a day or two, I should think that a mercantile jury would not hold that she was prevented from getting in. But supposing that the lock had fallen in, and that it would take at least several weeks or months to repair it, I think such a jury would say she was so prevented.

The present case, except that it is a case of a legal and not a

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physical obstruction, appears to me to fall exactly within the same category as the last example. The dock company, having plenty of room in the dock, refused to allow the ship to enter; not for a time, nor for a day or a week, but until they and the charterer could arrange as to giving a discharging berth to the latter, and when they would be able or willing to do so they could not and would not say. They would bind themselves to nothing, and all that they would say was, that it would be a month, or might be months, before they would in their good pleasure think fit to permit the ship to enter. It is not easy to see why they should not allow the ship to enter and lie afloat on their water space, waiting safely there to get up to a berth. Peradventure it was that the dock managers had a notion that the law was as is contended for by the Defendant, namely, that so long as the ship remained outside there could be no demurrage, and that they were minded to favour the charterer at the expense of the shipowner, by keeping the ship out. It was conceded in the argument that if the ship had been allowed or contrived to enter into any part of the dock, the voyage would have been at an end, although the ship had not got, and could not for a long time get, to the discharging berth, or had been actually turned out. I find a difficulty in apprehending the distinction between failing to get into the lock and failing to get up to the berth, between the ship being turned back at the lock gates and being turned out after she had got in without permission. It does not seem to me reasonable that the rights and liabilities of the parties should depend on the caprice of a third party, who, if that be so, might, apparently without violating any law, put a price on his exercise of such caprice. In my opinion it is more reasonable to hold that the voyage, *quâ* voyage, ends where the public highway ends, and that everything afterwards is part of the mutual and correlative obligations of the shipowner and merchant to do everything that is respectively incumbent on them in order to effectuate the discharge of the cargo, according to the true intent and meaning of the contract. The shipowner must, of course, be willing and ready to go into the dock specified, just as he must be willing and ready to proceed when in the dock to a proper berth assigned to him for unloading. There is, in my mind, a marked and broad distinction between the

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port of discharge, the usual public place of discharge in that port, which it is the shipowner's business at all events and at his own risk to reach, and the private quay, wharf or warehouse, or private dock, adjoining or near the port, on which or in which he is to co-operate with the merchant in the delivery of the cargo.

We expressed our opinion that the evidence did not establish that there was any special or peculiar custom of trade applicable to the case. But I cannot help thinking that that evidence shews that everybody really acted according to the law as I understand it. The printed forms prepared by the dock company are all based on the assumption that it is the merchant who will apply for the necessary pass for the ship, and it was the merchant who always did apply for and obtain such pass to be forwarded to the ship at *Gravesend*, the ship learning from such pass, and such pass only, by what lock it was to enter.

Solicitors: *Druce, Sons, & Jackson; Plews, Irvine, & Hodges.*

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[1878 B. 415.]

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March 27.

Husband and Wife—Separation Deed, Action by Husband to enforce—Counter-claim by Wife for Judicial Separation—Cruelty—Lapse of Time—Breaches of Covenant—Custody of Children—Infants' Custody Act, 1873 (36 *Vict. c.* 12).

Where a deed of separation had been executed between a husband and wife who had continued to live apart, and the wife more than five years afterwards, by counter-claim to an action by the husband to enforce the deed, claimed as against him a judicial separation on the ground of alleged cruelty:—

Held, that her right to judicial separation was barred by lapse of time and by the execution of the deed of separation.

Brown v. *Brown* (1) observed upon.

A married woman can contract to live apart from her husband, and the husband is entitled to come to the Court to enforce specific performance of such a contract.

A husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part.

Where, in a separation deed, the husband had covenanted to allow an infant child to reside with the wife, and had subsequently concurred as next friend of the infant in a petition under the *Infants' Custody Act* (36 Vict. c. 12) for the removal of the infant from the wife's custody which had been ordered by the Court:—

Held, that this was not a breach of the husband's covenant.

Injunction granted to restrain the wife from suing for restitution of conjugal rights.

6 P.D. 9
18 Ch. D. 67
679
7 P.D. 26
— 168. 67
8 P.D. 99
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8 App Cas
421. 430
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THIS was an action brought by the Plaintiff, the Rev. *Frank Besant*, against the trustees of a deed of separation made between himself and his wife, *Annie Besant*, and the said *Annie Besant*, as Defendants.

The facts of the case as alleged by the statement of claim were as follows:—

On the 21st of December, 1867, the Plaintiff intermarried with the Defendant, *Annie Besant*; the only issue of the marriage had been a son, *Arthur Besant*, born on the 16th of January, 1869, and a daughter, *Mabel Besant*, born on the 28th of August, 1870.

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(1) Law Rep. 3 P. & D. 202.

By the deed of separation, dated the 29th of October, 1873, and made between the Plaintiff of the first part, the Defendant, *Annie Besant*, of the second part, and the trustees of the third part, after reciting that unhappy differences had arisen between the Plaintiff and his wife, and that they had consequently agreed to live and were then living separate from each other upon the terms and conditions thereinafter mentioned, and that it had been agreed that such covenants as were thereinafter contained should be entered into with reference to the custody of the children, and that upon the treaty for the said separation it was agreed that the Plaintiff should have the sole charge and custody of their child *Arthur*, and that the Defendant, *Annie Besant*, should have the sole charge and custody of their child *Mabel* during the life of the said *Annie Besant*, subject to the conditions thereinafter contained, it was witnessed that the Plaintiff, in pursuance of the agreement on his part and in consideration of the covenants on the part of the trustees thereinafter contained, did thereby covenant with the trustees that, notwithstanding the marriage, it should be lawful for *Annie Besant* from thenceforth to live separate and apart from the Plaintiff, in the same manner as if she were sole and unmarried, in such way as she might think fit, and that the Plaintiff would not compel her to cohabit or live with him, or institute any legal proceedings or take any other steps whatsoever for that purpose, and would not molest or in anywise interfere with her in her manner of living or otherwise; and also that she should be absolutely free from all command, restraint, or authority of the Plaintiff, who should not from thenceforth prosecute any person or persons for harbouring, protecting, or assisting her, or in any way interfere or disturb her in her way of living, or in her liberty of going, remaining in, or returning from such place or places as she might think proper. Also that she should enjoy her own property for her separate use and have power to dispose of it by deed or will.

After certain other covenants on the part of the Plaintiff which it is unnecessary to set out, it was also witnessed that in further pursuance of the said agreement on the part of the Plaintiff he thereby covenanted with the trustees that he would during the joint lives of himself and the said *Annie Besant* pay to the trustees

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the yearly sum of £110 by monthly payments. And also that, except during one month in every year as thereinafter provided, the said *Annie Besant* might have the said *Mabel Besant*, so long as she should continue an infant, to reside with her or where she should from time to time direct, and that, except as aforesaid, she should have the sole custody and control of the said *Mabel Besant* free from interference or interruption on the part of the Plaintiff; and also that she might in each year for one month have the said *Arthur Besant*, so long as he should continue an infant, to reside with her, or where she should from time to time direct, and that during such period she should have the sole custody and control of *Arthur Besant* free from interference or interruption on the part of the Plaintiff; and also, that, if the said *Arthur Besant* should be so resident, the Plaintiff would, in addition to the annuity of £110, pay to the trustees a proportionate part for his maintenance. And it was declared that the trustees should stand possessed of the yearly sum of £110 and the additional payment in respect of the maintenance of *Arthur Besant* upon trust to pay the same to the Defendant, *Annie Besant*, for her separate use, without power of anticipation, so long as she should by letter or otherwise not molest or annoy *Frank Besant*, or institute any suit or other proceedings for the purpose of compelling him to cohabit with her, or to allow her any support, maintenance, or alimony whatsoever other than aforesaid; with a proviso that in case *Annie Besant* should by letter or otherwise molest or annoy the Plaintiff, or should institute any suit or other proceedings for the purpose of compelling him to cohabit with her or to allow her any support, maintenance, or alimony whatsoever other than as therein provided, then the yearly allowance of £110 and the said additional payment should cease and be void.

And the said indenture contained a covenant on the part of the trustees with the Plaintiff, in pursuance and performance of the agreement on the part of the said *Annie Besant*, and in consideration of the covenants hereinbefore contained on the part of the Plaintiff, that during all such time as the Plaintiff and *Annie Besant* should continue to live separate and apart from each other, the Plaintiff should not be liable to pay for the maintenance of the Defendant, *Annie Besant*, or of *Mabel Besant*, or to pay any debts on her own behalf, or on behalf of *Mabel Besant*, which might be contracted during the separation; and also that the Plaintiff might in each year for one month have *Mabel Besant* so long as she should continue an infant to reside with him or where he should from time to time direct, and that during such period the Plaintiff should have the sole custody and control of the said *Mabel Besant* free from interference or interruption on the part of the said *Annie Besant;* and also that the said *Annie Besant*, or any other person on her behalf, should not by letter or otherwise molest or annoy the Plaintiff, or commence or prosecute any suit or other proceedings to compel the Plaintiff to cohabit with her, or to allow her any support, maintenance, or alimony other than as before provided.

The Plaintiff had since the execution of the said deed lived apart and separately from the Defendant, *Annie Besant.*

On the 10th of May, 1878, on a petition presented by the said *Mabel Besant* by her father, the Plaintiff, as next friend, an order was made by the Master of the Rolls for the delivery over by the Defendant, *Annie Besant*, to the Plaintiff of the said *Mabel Besant* (1). Pursuant to this order *Mabel Besant* had been delivered over by the said Defendant to the Plaintiff, and had since resided with him or under his care.

On the 22nd of July, 1878, the solicitors of the Defendant, *Annie Besant*, addressed a letter to the Plaintiff, in which, after referring to the fact that the Plaintiff had refused to permit his son *Arthur* to reside with his mother under the terms of the deed of separation, they added: "Mrs. *Besant* has come to the determination to make every sacrifice for her children, from whom she will not live separate, and has therefore now decided to go home and live with you. We have therefore to ask you to inform us on what day early next week it will be convenient to you to receive Mrs. *Besant*, as she intends then to return to her home, and we trust, inasmuch as the deed is not binding, you will avoid the necessity of compelling her to institute a suit for restitution of conjugal rights by at once taking legal advice and satisfying yourself that she has a perfect right to resume cohabitation with you."

To this the Plaintiff's solicitors replied that, having regard to the decision of the Master of the Rolls with regard to *Mabel Besant*, they did not think it possible to permit the son to reside with his mother as suggested.

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(1) This order was subsequently affirmed by the Court of Appeal: *In re Besant*, 11 Ch. D. 508.

On the 1st of August, 1878, the Plaintiff's solicitors received the following letter from the solicitors of the Defendant, *Annie Besant*:—

> "We shall be glad to know whether it is your client's determination to refuse to receive Mrs. *Besant*, and to return to cohabitation with her. We are of course wishful to avoid any unpleasant scene at his house, and unless we hear from you definitely one way or the other she will be compelled to return."

The Plaintiff thereupon brought the present action.

The statement of claim alleged that the Defendant, *Annie Besant*, intended to and would return to the Plaintiff's house, and endeavour to resume cohabitation with him unless she was restrained from so doing by the order and injunction of the Court.

The Plaintiff claimed, first, to have the trusts of the deed of the 25th of October, 1873, carried into execution, and to have the covenants therein contained specifically performed, the Plaintiff being ready to perform the same on his part as the Court should direct; secondly, to have an injunction granted to restrain the Defendant, *Annie Besant*, from molesting or annoying the Plaintiff by letter or otherwise, and also from instituting any action or other proceeding for the purpose of compelling him to cohabit with her.

On the 9th of October, 1878, the Defendant, *Annie Besant*, delivered a demurrer, defence, and counter-claim. She demurred to the Plaintiff's statement of claim, alleging that the same was bad in law, on the ground that no such action could be maintained by a husband against his wife.

The said Defendant alleged by way of defence that, prior to the 22nd of July, 1878, every covenant in the separation deed required to be performed by her had been duly performed, but that the Plaintiff had failed to perform several of the covenants in the said deed. The alleged breaches on the part of the Plaintiff were stated to be as follows:—

That the Plaintiff had, by certain letters which the said Defendant specified, in 1874 molested and interfered with the use by the Defendant of her name in her profession of author and lecturer, and had sought to prevent her name being printed as a lecturer, which was necessary to enable her to gain her livelihood:

That in 1875 the Plaintiff withheld the said *Mabel Besant* from her mother after the expiration of one of her month's visits to the Plaintiff, and only returned her after some days' delay and under threat of legal proceedings:

That the Plaintiff had not since the 1st of May, 1878, made the monthly payments to the Defendant, *Annie Besant*, which were covenanted to be paid to her:

That the said Defendant had not had the sole custody and control of her daughter *Mabel Besant* free from interference on the part of the Plaintiff, but that the Plaintiff had presented a petition to the Court to deprive the said Defendant of the custody and control of *Mabel Besant*, on which petition the order before mentioned had been made:

That in July, 1878, the Plaintiff refused to allow the annual visit of his son *Arthur Besant* to the said Defendant:

The said Defendant alleged that, except for the purpose of obtaining access to her children, she had no desire to return to the Plaintiff's house, and she submitted that as the Plaintiff had so violated the covenants on his part she ought not to be deprived of her legal right to maintain an action.

The Defendant, *Annie Besant*, claimed by way of counter-claim that the covenants in the said deed on the part of the Plaintiff might be specifically performed; and, further, that so long as the order of the Master of the Rolls of the 18th of May, 1878, remained in force the deed might be rectified by inserting provisions for reasonable access to the said *Mabel Besant* by the Defendant, *Annie Besant*.

On the 4th of November, 1878, the demurrer to the Plaintiff's statement of claim was overruled by the Master of the Rolls.

On the 23rd of January, 1879, the case came on for hearing, and the Defendant, *Annie Besant*, who appeared in person, having stated that she desired to institute proceedings for judicial separation, the Master of the Rolls gave her leave to amend her counter-claim by adding a claim for judicial separation.

On the 28th of January, 1879, the Defendant, *Annie Besant*, delivered an amended counter-claim, alleging various acts of cruelty on the part of the Plaintiff in the years 1870, 1871, 1872, and 1873, and submitting that she was entitled to a decree of judicial separation from the Plaintiff.

The Plaintiff delivered an amended reply, denying the several alleged acts of cruelty, and submitting that there was no case for judicial separation.

In answer to interrogatories on behalf of the Defendant, *Annie Besant*, the Plaintiff, stated that in 1874 he had written to the author and publishers of a certain work requesting that if a report of a lecture by the said Defendant should be given in the said work, the name of the Defendant, *Annie Besant*, might not appear therein, but that he had not otherwise interfered with the said Defendant in the use of her name in her profession of an author.

Ince, Q.C., and *W. W. Cooper*, for the Plaintiff:—

The amended counter-claim raises the question whether Mrs. *Besant* is entitled to a judicial separation on the ground of cruelty. On the pleadings as they stand we submit that she cannot now claim that relief. The agreement for separation is dated the 29th of October, 1875. From that time they have agreed to live separate, and the claim for judicial separation on the ground of cruelty was not made till January, 1879, when the amended counter-claim was delivered.

The ground on which a wife is entitled to judicial separation on account of cruelty is the danger to which she would be exposed from continued cohabitation: *Matthews* v. *Matthews* (1); *Marshall* v. *Marshall* (2); *Rowley* v. *Rowley* (3); *Williams* v. *Williams* (4); *Milford* v. *Milford* (5); *Curtis* v. *Curtis* (6).

Mrs. *Besant*, who appeared in person, contended that the deed of separation might have weighed with the Court as an answer to the claim for judicial separation if the Plaintiff had not, in breach

(1) 3 Sw. & Tr. 161.
(2) 27 W. R. 399.
(3) Law Rep. 1 H. L., Sc. 63.
(4) Ibid. 1 P. & D. 178.
(5) Law Rep. 1 P. & D. 295.
(6) 1 Sw. & Tr. 192; on appeal, 28 L. J. (N.S.) P. & M. 55.

of his covenant in the separation deed, commenced proceedings against her. The result was that whatever rights she (the Defendant) had which might otherwise have been barred, revived: *Brown* v. *Brown* (1).

Jessel M.R.:—

I have no doubt whatever as to the decision I ought to give. First, I will state what my view is of the law upon the subject, and then I will refer to one or two authorities upon the question, and then consider the circumstances of the case.

The counter-claim in this case is an application by the wife for a judicial separation from the husband on the ground of cruelty. The foundation of that jurisdiction, as I understand it, has always been this, that the apprehension of cruelty or cruel treatment on the part of the husband made it impossible for the wife with safety to herself to continue to cohabit.. The proof of the actual cruelty committed was only brought in to shew that it was likely to be renewed, because it was perfectly well settled that the effects of cruelty might reasonably cause some apprehension in the wife's mind, and might, therefore, be a foundation for a divorce *a mensâ et thoro*, or a decree of judicial separation.

That being so, it is very difficult to understand that that law can have any application to a case where the cohabitation has ceased for years by mutual consent and cannot be renewed without such consent. It cannot be said in that case that the wife is entitled to the protection of the Court to separate her from her husband, because she is already separated by an instrument which could be enforced by a Court of Equity. The reason of the Court's intervention entirely disappears when the separation has once taken place and is agreed to by deed. Of course that involves the question as to whether the deed has or has not ceased to have any operation.

I see no ground whatever for supposing that this deed has ceased to operate. No doubt one of the terms of the deed was that one of the children should be given to Mrs. *Besant*; but the Court, in exercise of the power reposed in it by the Legislature, has provided otherwise for the custody of the infant, and, notwith-

(1) Law Rep. 3 P. & D. 202.

standing the provisions of the deed, has taken away that custody from her. It appears to me that that does not destroy the deed; it was one of the considerations, but it must have been a consideration dependent entirely upon the interest of the infant requiring the Court's intervention. That is my view—although the attention of the Court was called to it by the husband, and although the husband was the next friend of the infant, the interference of the Court, according to my view, was in favour of the infant, and I am of opinion that there was not a breach of the covenant on the part of the husband: whether you consider this as being a covenant originally made subject to the terms of the Act of Parliament, or whether you consider the Act of Parliament itself, it, *pro tanto*, would still not be a breach on his part. It does not appear to me that that would destroy the deed, nor do I understand that anything would destroy a separation deed properly so called except a return of the wife to cohabitation. No doubt the husband might so conduct himself that the Court might refuse at his instance to enforce the deed. I understood that would be one of the points to be urged in the claim in this case, but it certainly cannot be alleged for one moment that the breach of the covenant by the husband could destroy the deed so as to have prevented the wife insisting upon it as a bar to a suit for a return to cohabitation instituted by the husband, and it is in that view I am inclined to see it. It appears to me that it is impossible that any breach of covenant on his part can prevent her insisting on the deed as a protection to her from any threatened violence, so that she is entitled to invoke the interposition of a Court of Equity to restrain any action on the part of the husband for a restitution of conjugal rights.

That being so, it seems to me that in this case the lapse of time, coupled with the deed, is a complete bar to relief by reason of the cruelty alleged, and all of which I see is alleged by the amended counter-claim to have taken place not later than some time in the year 1873, before the execution of the deed of the 23rd of October in that year. That being so, and assuming for this purpose that the acts of cruelty are proved, which I am bound to do, the husband and wife agreed to separate on the 23rd of October, 1873, and this allegation is introduced by the Defendant on the 28th of

January, 1879, nearly six years after the alleged cruelty, and nearly six years after the execution of the deed of separation. I think that lapse of time coupled with the deed of separation would be a bar, but I think also that there are circumstances in this case which would make the lapse of time alone a bar.

There is another ground on which I think the claim for judicial separation could not be admitted. I am satisfied that it is not a *bonâ fide* claim on the ground of actual apprehension of violence. It is clear to my mind that the object of the claim is for another purpose—I by no means say an improper purpose. The object of the lady is to be free from having anything to do with her husband, and to acquire certain rights which separated women have, and which only women who are thus separated can have. I have not a word to say against the motive, but the motive and purpose are evidently collateral, and are not the real motives which ought to be the mainspring in such a suit—protection of the wife from the violence of her husband. That that is so is clear from what has taken place in the suit. If the wife had really been in fear of the husband she would not have desired to return. But this suit has been instituted by the husband on account not only of expression of such a desire, but of a threat on her part to institute a suit for a restitution of conjugal rights. It is only necessary for me for this purpose to read a portion of two letters which are written in the case, and which were written by the solicitors of the wife, to the husband. The first letter is a letter of the 22nd of July, 1878. After describing in a feeling way the state of anxiety and grief Mrs. *Besant* was in on account of her separation from her little daughter, the letter goes on to say that, as the children are refused to Mrs. *Besant*, she has "determined to make every sacrifice for them," and will return to Mr. *Besant's* house to be with the children, "from whom she will not live separate." Then there is a letter from the solicitors of Mr. *Besant*, stating that, having regard to the decision of the Master of the Rolls in regard to the daughter, he cannot allow the son to visit her. That is another question. In the deed the son was to visit the mother, I think, one month in the year, and there is a question, which has been very properly brought before me at Chambers, which raises in Mr. *Besant's* mind something more than a doubt as to the propriety of the son being allowed to visit her. The matter is still under consideration. The answer to that letter is: "We must therefore leave you to take such proceedings as you may think proper to adopt." And then there is a reply on the 31st of July, 1878, from the wife's solicitors to the solicitors of the husband, which says that unless some answer be given definitely "Mrs. *Besant* will be compelled to return." I think it is impossible with these letters, written by Mrs. *Besant's* solicitors and not repudiated by her, to believe for one moment that she is under any dread of any danger of personal violence which will prevent her from returning in safety. Therefore I have come to the conclusion that this suit is instituted, as I said before, for a collateral, though I do not mean to say it is from an improper motive.

Now, with regard to the authorities, those to which I have been referred on the subject are, to my mind, conclusive upon it. First we have the case of *Matthews* v. *Matthews* (1), in which the lapse of time had not been much less than in the present case. The cruelty was before October, 1853, and the suit was instituted, I think, either late in 1858 or early in 1859. In that case there was a separation deed, and the Judge Ordinary said: "The ground on which the Ecclesiastical Court in such cases interfered was to protect the person of the wife. In fact, the wife in this case is in no danger." On appeal, *Martin*, B., said, in agreeing that the lapse of time alone would not do, "You must also take into consideration the deed of separation." *Willes*, J., said: "This is a case which we ought not to encourage; we ought to carry out the law as far as we can," and "that there was no such apprehension of danger as is now alleged."

The case also cited of *Milford* v. *Milford* (2) has this passage in Lord *Penzance's* judgment: "The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread." As I said before, this lady is now in no dread.

That being the position of matters, I have now to consider what would be the result if an action were commenced by the husband for restitution of conjugal rights. There is a recent decision by the present President of the Probate and Divorce Division in the

(1) 3 Sw. & Tr. 161.

(2) Law Rep. 1 P. & D. 299.

case of *Marshall* v. *Marshall* (1). There he went through the authorities, and came to the conclusion that a deed of separation was a bar to a suit for restitution of conjugal rights, and he therefore held that when a wife brought a suit—the same thing would apply to the husband, of course—the plea of the deed of separation was a sufficient defence. As I said before, if the husband brought the action and the wife pleaded the deed, the plea of the deed would be a sufficient defence, and it is not possible that any breach on his part of any of the covenants would prevent the wife from availing herself of the deed as a sufficient defence.

I now come to consider the only case that was cited by Mrs. *Besant*. That is the case of *Brown* v. *Brown* (2). That case was very different as regards dates from this. The last act of cruelty took place in May, 1872. The husband entered into an agreement with the wife that they should live separate, and the deed of separation was executed. I cannot tell the exact date, but some time in 1873 the husband instituted a suit for divorce by reason of adultery. That suit came on to be heard on the 24th of June, 1874. The jury found in favour of the wife as regards the adultery, and also found against the husband on the question of cruelty. About the 21st of July, 1874, a motion was was made for a judicial separation, which was granted. The next thing to be considered is this—on what grounds the Judge gave the wife this benefit. Now, I must say that this case was decided before the learned Judge had decided *Marshall* v. *Marshall*. He does not seem to have taken into consideration the fact that the wife had a complete answer to a suit for the restitution of conjugal rights—it had not then been decided that she had, and perhaps that is the reason he did not consider it. But he seems to have considered that the husband had so misconducted himself that he was not entitled to rely upon the agreement for separation, and that therefore the wife was also entitled to repudiate it. But with the greatest respect for the learned Judge, the repudiation of the deed of separation means, I suppose, the right to return to cohabitation, and if so—if that must be the voluntary act of the wife—it does not appear to me possible that she can say that she is in dread, or that there is any danger. He seems to have omitted from his

(1) 27 W. R. 399.

(2) Law Rep. 3 P. & D. 202.

consideration the foundation of the law, which was the apprehension of danger on the part of the wife. As in *Marshall* v. *Marshall* (1), she could not be in any danger at all.

He says this (2): "I was asked on behalf of the Petitioner not to grant a decree of judicial separation on the ground that the Petitioner and Respondent were, at the time of the institution of the suit, living apart under a deed of separation, the terms of which have always been complied with by the husband, and to the obligation of which he still remains liable. I have several times expressed an opinion that it is not the duty of the Court to discourage the settlement of matrimonial differences by arrangement between the parties rather than by litigation. It is always for the benefit of the children if there be any . . . A wife who has reason to complain of her husband's conduct may be disposed to submit to very disadvantageous terms rather than injure her children's prospects, and run the risk of injury to her own reputation by the unavoidable exposure which must follow if she should institute a suit against her husband. But if the husband, by bringing an unfounded charge against the wife, compels her to make known in self-defence her own grounds of complaint against him, the foundation of the settlement between them is removed, and the consideration fails upon which it was entered into."

I must say that I cannot accede to that argument; he cannot certainly destroy the deed when one of the motives of the deed, no doubt, is to keep from the public eye the details of these matrimonial quarrels. But that is not the consideration for the deed. It is a motive, but not the consideration. And therefore, when he says that this is the consideration, it appears to me to be a mistake. There is no such total failure of consideration as to destroy the deed, although it might be that one of the parties to an agreement might so misconduct himself or herself that a Court of Equity would refuse to enforce specific performance at his or her instance. But that does not, as it appears to me, destroy the effect of the instrument, or prevent either, not misconducting himself or herself, from relying on the deed. It seems to me that the learned Judge's objection will not hold good. When there is no danger, there is no ground for the interference of the Divorce Court.

(1) 27 W. R. 399.

(2) Law Rep. 3 P. & D. 203.

Then he says: "In such a state of things it is only just that the wife should be remitted to her original position." That would put an end to the deed. As I said before, the question is—what the law does give. If the law is correctly stated in the cases to which I have referred, the law only gives judicial separation in cases where there is apprehended danger. But, irrespective of the reasons for differing to some extent from the judgment of the learned Judge, I must say that, assuming every word of it to be as well founded in law as his decisions usually are, it does not apply to the case before me. The ground that he puts it on is this—that the husband, by bringing a suit for divorce by reason of adultery, compels a wife to disclose in open Court her grounds of complaint against him. I have assumed that that was so. It was inevitable in discussing the one charge that the other should be discussed. That is in no relation to a simple suit like this, for restraining the wife from instituting a suit for restitution of conjugal rights. The institution of a suit for restitution of conjugal rights cannot compel the wife to disclose the details of cruelty. She wants to go back—to return to cohabitation. It is her interest and her duty under those circumstances to cast a veil over all the wrongs her husband may have previously committed. She wishes to return to his home, and regain or retain his affection. How, then, can it be a case of compulsion on her to make known, in self-defence, acts of cruelty? It seems to me that there is no pretence for saying that in a suit of this kind there was any such compulsion, her object being, as alleged, to return. That was entirely contrary to the object of the husband, namely, to obtain a divorce. It seems to me, taking every word of that judgment to be unassailable, it not only has no application to the case before me, but so far as it has any indirect application it is against the contention of the wife.

I am therefore of opinion that this counter-claim for cruelty is barred by lapse of time, and by the execution of the deed of separation, and that, even if I came to the conclusion that the husband was not entitled to enforce the deed, it would still be an absolute bar to the right of judicial separation.

Ince, Q.C., and *W. W. Cooper*, for the Plaintiff on the case raised by the statement of claim, now contended that the Plaintiff was entitled to have the covenants in the separation deed specifically performed, and to an injunction to restrain the Defendant, Mrs. *Besant*, from instituting any action or other proceeding for the purpose of compelling him to cohabit with her.

The Defendant, Mrs. *Besant*, contended that a suit could not be maintained by a husband against a wife to enforce a separation deed: *Duke of Bolton* v. *Williams* (1); *Aylett* v. *Ashton* (2). Even if such a suit could be maintained, the Plaintiff in this case had disentitled himself to relief by his conduct, as he had himself broken the several covenants entered into by him in the deed by interfering with the Defendant in the exercise of her calling as an author and lecturer, by departing from the stipulation with reference to the custody of the children, and by having failed to continue the monthly payments to the Defendant.

Grosvenor Woods, for the trustees.

Ince, in reply.

JESSEL, M.R.:—

This case is a most singular one. It is a suit between a husband and his wife who have been living apart for several years. The curious thing about it is that the husband does not wish to live again with the wife, and the wife does not want to live again with the husband; and yet the whole question before me is whether I ought to restrain the suit for restitution of conjugal rights which has been threatened on behalf of Mrs. *Besant*, and which would fail if it was instituted, and which I am equally well satisfied the wife did not intend to institute. That is the odd position in which I am placed, and in which I have to decide some very important questions of law, there being no real intention on the one part or on the other to live otherwise than separately.

The real contest between the parties is of a totally different character, as to the custody of the children of the marriage. As I understand it, the object of the wife first of all in threatening to institute a suit for the restitution of conjugal rights, and not asking

(1) 2 Ves. 138.

(2) 1 My. & Cr. 105.

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for a decree of judicial separation, was really with reference to the custody of these children. That is a question I cannot entertain in this suit at all except to a very moderate extent.

The suit raises points of the very greatest importance as regards the general law, upon which I can give my opinion—and I say my opinion advisedly, because I am free to confess that the law is not so clearly settled on the point that the Judge can lay down the law; he can only give his opinion of the law. Judicial opinion has varied a great deal, and must vary a great deal, when you consider the ground upon which that judicial opinion or those judicial opinions have been founded. This is a branch of law which depends upon what is commonly called "public policy." Now you cannot lay down any definition of the term "public policy," or say it comprises such and such a proposition, and does not comprise such and such another: that must be, to a great extent, a matter of individual opinion, because what one man, or one Judge, and perhaps I ought to say one woman also in this case, might think against public policy, another might think altogether excellent public policy. Consequently it is impossible to say what the opinion of a man or a Judge might be as to what public policy is. For a great number of years, both ecclesiastical Judges and lay Judges thought it was something very horrible, and against public policy, that the husband and wife should agree to live separate, and it was supposed that a civilised country could no longer exist if such agreements were enforced by Courts of Law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy; other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of Court, although the consequence might be that they would live separately, and that was the view carried out by the Courts when it became once decided that separation deeds *per se* were not against public policy.

The next question was, whether they could be enforced, and if so, should they be enforced against the wife as well as against the husband? There are express decisions as to enforcing them against the husband. I think there are also decisions—or what amount to decisions—that they might be enforced against the wife, but these are not so clear, and, possibly, opinions may vary as to the effect of them. I think that is the effect of them. If they can be enforced against the wife, on what grounds? It has been said over and over again that a married woman cannot contract. That again is too wide a proposition. She undoubtedly can contract in certain cases. She can contract, we all know, with respect to property settled to her separate use. But it is a contract which at first in a sense was not personally binding on a woman, but it now binds her about as much as it binds a man. It no longer personally binds a man in the sense that you can send him to prison for a breach of it. There is another kind of contract, not relating to separate use at all, but a contract for the disposal of freehold estate, by which our law requires the concurrence of the husband, or a dispensation by a Court of Law with such concurrence. It is a contract by a conveyance acknowledged by a married woman. That is a case in which a married woman can contract.

Suppose a married woman is entitled to sue or defend alone—there are a great many cases in the Ecclesiastical Court, now the Probate and Matrimonial Division of the High Court, where a woman sues for nullity of marriage, separation, divorce, or restitution of conjugal rights. She sues the husband. Under the *Judicature Act*, the married woman by leave of the Court is entitled to sue or defend alone even without a next friend. Of course all the old issues in equity still remain where a wife sues as Plaintiff by her next friend. In these cases what are the wife's rights? She is, so to say, the mistress of the situation. She can sue through her next friend, she can bring on her case in the usual way, and conduct it in such a way as she thinks fit or directs. Is it conceivable that, having all these authorities, she has not also the power of compromising the case, and that she cannot withdraw or consent to terms? Is it conceivable that a Court of Justice which allows a married woman to institute a suit for divorce, or to institute a suit for restitution of conjugal rights, shall say, "You have no right to anything beyond that; you have no right to effect a compromise, but must go on to the bitter end;—to say that she

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can accede to no terms which can be binding; that no terms shall be binding on her, because she is incapable of entering into an agreement? I think that is not conceivable. Having regard to that which is rational, and which I hope will always be law, I think the moment you empower a married woman to sue or defend in her own name, you must empower her also to compromise that suit on terms which may be fairly arranged, and consequently in all those cases, whether they have or have not reference to her personal *status*, she must take, as an incident to the right to sue, the right to contract—to compromise that suit. Therefore, I think that is again an exception, and that the woman in that case must have a right to contract. I do not find it laid down in these large and plain terms, though I think I can extract as much from the decisions.

Now we come to the next point. If a married woman can compromise a suit after she commences it, why not when she threatens it, or before she begins it? If, after instituting a suit for a divorce, or having a suit for a divorce instituted against her, and she defending it, she can compromise by agreeing to live separate on terms as regards maintenance of herself, custody of her children, and so forth, why not before? Why not after the quarrel and before the litigation commenced? The very same reasons appear to me to apply to the one case as to the other. If the wife has the right to sue for restitution of conjugal rights, for separation, or for divorce, if she has the right after beginning a suit to compromise the suit, she ought to have a right to do so before; and, if she has the right afterwards in the sense of being bound by her agreement, why should she not have the same right before as regards these matters as to which she has a clear right to institute the suit, these matters being matters of personal *status*, and the question that of living together or not? It seems to me to follow as a necessary corollary to the right to sue by herself that she must have the right to contract not to sue, and I should think that there would be no difficulty at all about it. At the same time I confess there are to be found numerous *dicta* the other way, though there are some my way as to what the law is. I think that the law is therefore that a woman can contract to live separate and apart from her husband. That contract, like all

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other contracts, if not against public policy, is one which may be upheld and enforced.

The next point I have to consider is one of much less importance, though of some importance to the parties, therefore I will say a word or two about it. Now the case which really decided that these contracts to live separate and apart from each other were not against the policy of the law is the well-known case of *Wilson* v. *Wilson* (1). The form of the appeal in that case was relating to the execution of the deed of separation, and not to enforcing the separation itself. But of course, if the deed when executed had been against public policy, no order could have been made, or ought to have been made, but the House of Lords decided in that case that there was nothing against public policy in the deed of separation itself, and I think it must be considered to be established by that case that any notion of such deeds being against public policy was finally dispelled or got rid of. No judgment in that case was given on the question as to whether the Court could enforce by injunction a stipulation to live separate.

The point came on afterwards in the case of *Hunt* v. *Hunt* (2). There the Master of the Rolls refused to grant an injunction, and amongst other grounds the injunction was refused upon the ground that there was no mutuality of agreement. It was appealed to Lord *Westbury* (3), who gives a clear expression of opinion that the ordinary power of contracting, of course on both sides, ought to be enforced in the ordinary way. He afterwards gave a final judgment (4), from which I think that his opinion was that you might sue the wife, and that you might claim and obtain an injunction against her.

Here again I can support my conclusion by the case of *Marshall* v. *Marshall* (5), before the President of the Probate Division. There is a clear expression of opinion by Sir *James Hannen*, coming to the same conclusion as that at which I have arrived, that Lord *Westbury's* opinion was in favour of the power of the Court to prevent the wife, in a suit instituted against her by the husband, from instituting a suit for the restitution of conjugal rights.

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(1) 1 H. L. C. 538.

(2) 4 D. F. & J. 221. 8 Jur NS 55

(3) 4 D. F. & J. 233.

(4) Ibid. 235. 8 Jur N.S. 57

(5) 27 W. R. 399.

I may mention, in addition to those cases, a case which is of very little importance, because it is a case in which the wife did not appear, but it shews the opinion of a learned Judge, the late Vice-Chancellor *Wickens*, that such an injunction could be granted. It is the case of *Flower* v. *Flower* (1). There is, as I said before briefly, a considerable mass of judicial opinion to be found in favour of the injunction. There are cases on the other side equally numerous, but, with one or two exceptions, all of them anterior to the decision of the House of Lords in *Wilson* v. *Wilson* (2).

I will only mention one more case; it is the case of *Rowley* v. *Rowley* (3). There a divorce was sought by the wife; it was compromised by agreement, a juror being withdrawn, and the petitioner moving at the proper time to have the petition taken off the file. The petitioner was the wife; the respondent assented to the application. The wife undertook to execute the deed of separation, which contained a covenant that she would not molest the husband or institute proceedings in the Divorce Court. She did institute proceedings, and it was held that her contract was a bar to those proceedings. Now the case was put entirely on the contract. It says the agreement has been violated, and why should not the Court give it effect? Sir *James Wilde*, before whom the case came in the first instance, refers to a class of suits for restitution of conjugal rights, and that applies emphatically in this case, because the wife promised by this agreement to live apart. Taking it in the narrower view of Sir *James Wilde*, that case would apply. That was the opinion of the full Court, and finally it went to the House of Lords. The House of Lords affirmed the decision, and the Lord Chancellor, in approving it, said the whole question in the case turned upon the meaning of the words in the agreement, and went on to discuss them, and Lord *Cranworth* said the same. Therefore everybody treated it as a contract, and called it an agreement binding on the wife, a contract that she would live separate and apart. The moment we get rid of the distinction, as it is now got rid of by the passing of the *Judicature Act*, that case seems to me to clearly apply to shew that it is a contract to be properly enforced. I believe, therefore, that so far as the general law is concerned, though you cannot treat it as settled, but according to my opinion of what is the law and what it ought to be, the remedy is mutual, and the husband as well as the wife is entitled to specific performance of the agreement to live apart.

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(1) 20 W. R. 231.

(2) 1 H. L. C. 538.

(3) Law Rep. 1 H. L., Sc. 63.

Now, as to this agreement. What have we here? We have here a covenant or agreement to live apart, with special covenants in the agreement as to the custody of the children. I am not going through the long series of cases which finally settled that a father had not the power—here again public policy is invoked—to give up the custody of his children. He had not either in law or equity the power to abrogate his parental functions, and say that the custody of the children shall be given to the wife. The result was that those covenants and agreements contained in deeds of separation relating to the custody by which the father gave up the custody, care, and education of infant children to the wife, were held to be void, and consequently the instrument founded upon them was held to be void also. This was considered a hardship, and the Legislature ultimately took a different view of public policy from that taken by the judicial decisions, and it ended by the Act of Parliament, the 36 Vict. c. 12, which received the Royal assent on the 24th of April, 1873, by which it was enacted that no separation deed made between the father and mother of an infant should be held to be void by reason only of its providing that the father of such an infant should give up the custody or control thereof to the mother, provided always that no Court should enforce any such agreement, unless the Court should be of opinion that it would be for the benefit of the infant or infants to give effect thereto. As I read that statute, it refers to an agreement between the father and mother, and to that extent says that they may agree—it says no deed shall be void. It appears to me there entirely to confirm the view of the law, which I think is the correct view, but it does introduce a proviso that the Court shall not enforce the agreement as regards the children, unless it be to the advantage of the children.

Now I come to this particular case before me, and I find the only agreement between the husband and wife directly is an agreement contained in the beginning of the deed. It recites that unhappy differences had arisen between *Frank Besant* and *Annie Besant*, and they were now consequently agreed to live separately from each other, upon the terms and conditions thereinafter mentioned. And when we come to the covenant by the trustees we find these words—so the parties completely understood there was an agreement between the husband and wife: "In pursuance and performance of the said agreement on the part of the said *Annie Besant*, and in consideration of the covenants of the Plaintiff hereinbefore contained." [His Lordship then stated the effect of the principal covenants in the deed.]

If I am right as to the view I have taken of the law, the only questions I have to decide are—first, whether the lady has broken her agreement; and secondly, if I decide that against her, whether the husband has by reason of any conduct or misconduct on his part lost that right which he otherwise would have possessed to enforce specific performance of the agreement. As to the alleged breach on the part of the lady there can be no doubt. What happened was this: On the 18th of May, 1878, on a petition presented by the father, in the name of his daughter *Mabel*, I made an order directing the delivery over by the lady of the daughter, on grounds which I may mention shortly, and after that order Mrs. *Besant*, through her solicitors, gave notice by letter that she had determined to go home and live with her husband again, and she threatened a suit for restitution, and also gave him notice that she would go to the house. Therefore, there can be no doubt about the breach of the agreement on her part. I must say I do not think she intended anything of the kind. I believe she used those words really as a means of obtaining the custody of the child, and in fact she has admitted almost as much in the speech which she made to-day; but still, there they are. The husband was entitled to regard them as serious threats, and as clearly a breach of the agreement.

I now come to a most material part of the defence, as to whether the Plaintiff comes into Court with clean hands. Courts of Equity have always held that a man might so misconduct himself as to lose the right of specific performance of an agreement. What the lady says in substance is this: "You have broken every covenant you could break, and now you are asking me to perform mine." I must now examine, first, as to whether it is so in fact; and secondly, whether there has been any waiver of those breaches. First as regards the facts, the breaches are these: She says that in 1874, she then being an itinerant lecturer, and lecturing on the "Rights of Women," and various subjects of that kind, was endeavouring to add by her own exertions to the allowance which was made to her under the separation deed. It seems that the husband was a beneficed clergyman of the Church of *England*, and he felt annoyed that his wife, bearing his name, was going about the country, lecturing, as he says, in a way he did not approve of; and he did write letters to a publisher and to another gentleman, asking that in publishing the lectures her name should not be stated to the public. What his object was I think is pretty clear. It was not to prevent her getting her livelihood, but to prevent its being known that it was his wife getting her livelihood in this way; and I will not say whether it was reasonable or unreasonable. In one view of the case it was very reasonable for her to lecture in her own name if she so pleased. But there is no disgrace that I am aware of in adopting a *nom de plume*. Many authors do it, and others who have attained to very great celebrity have done it, but of course there was no obligation on the lady to do so. It was a very small matter. Perhaps in strictness it was—I am not sure that it was—a breach of his covenant not to interfere with her. The covenant is that he is not to compel her to cohabit or live with him, and not to molest or otherwise interfere with the said *Annie Besant* in her manner of living. I am not prepared to decide that it was an interference, but I will assume it was. It was a very slight matter, and has been entirely got rid of by their going on as they did before, both as regards the payment of the annuity and the custody of the children. I should not have held it to be such a breach of covenant as would have prevented his obtaining specific performance, even if I were quite clear that it was a breach at all, considering the very peculiar circumstances of the case. It is not every breach of a covenant upon his part which prevents a man coming to a Court of Equity to have covenants enforced. Take a simple instance. A man is a lessee, with a proviso that he may purchase on a six months' notice. He does not pay his rent punctually, but that does not prevent his coming here for a specific performance of the purchase. It must not only have some connection with the matter for which specific performance is sought, but it must be some such material and substantial breach as will enable the Court to say that his conduct has been such that it ought not to interfere in his behalf at all.

Passing from that to the next breach, this appears also to me to be a very small matter. In July or August, 1875, there was some difficulty on his part as to giving up the daughter after the one month she had to pass with him. The daughter was to stay eleven months with the mother and one month with the father, and the son was to stay eleven months with the father and one month with the mother, and in fact there was four days' delay in giving the daughter up; but, however, she was received back after that. This was in the year 1875, and everything went on as before, both as regards the receipt of the annuity and as regards the children. Here again, if it was a breach it was a very trifling matter, and, whether it was a breach or not, it certainly in my opinion would not be a bar to the husband's instituting a suit against the wife to restrain the wife from bringing an action for restitution of conjugal rights.

The next point is this:—[His Lordship then referred to the next alleged breach, namely, that the Plaintiff had for some months after the order of the 18th of May, 1878, neglected to pay the monthly allowance. This, in his Lordship's opinion, arose from a misunderstanding of a proposed arrangement made by the lady; and, as the money had since been paid, it was immaterial.]

I now come to the last and most serious question, the really serious question between the parties, that is, the custody of the children. The husband certainly covenanted and agreed that the girl should remain for eleven months with the mother and the boy one month, and he has not allowed them to do so. He has not allowed the girl to remain. That, I take it, standing alone, would be a clear breach of a most important covenant, but we must look at the subject in a broad view. The covenant was entered into after the passing of the Act of Parliament. Before that Act of Parliament it was simply void, but after that Act it is not an absolute covenant, because it is a covenant controlled by the Act, and everybody must be taken to have known it. It is a covenant, though it is not to be enforced by the High Court, unless the Court is of opinion that it would be for the benefit of the infant that it should be enforced. The deed therefore stands precisely in the same position as if the words of the Act of Parliament had been put into the deed that she shall have the custody unless the Court takes the custody away. That is really the contract between the parties. She knew he could not covenant absolutely by law, he could not give away absolutely and for ever the custody of these children, and there was always a power in the Court to intervene and take them away, and that being so, and the Court having intervened, how can I say that that act of the Court is a breach on his part of the covenant, because he happened to be of the same opinion as to the custody of the infant as the Court? The covenant being a covenant subject to the interference of the Court, and the interference having been made, it does not appear to me to be possible for her to say that is a breach of covenant on his part which will destroy the effect of the deed or prevent his enforcing it. So much for the girl.

But the boy stands on the same footing exactly. The reason I took away the custody of the girl was that I was of opinion that the lady had shewn herself unfit for the custody of the girl by reason of certain publications issued by her, to which her name was affixed, with her knowledge and sanction, after the separation deed. That applied quite as much to the boy as to the girl. If she was not fit to have custody of the one, having regard, of course, to the benefit of the infant, she was not fit to have the custody of the other. Having regard to the decision of the Master of the Rolls as regards the girl, they say, "We cannot send you the boy." It was then on the application of the lady at her own request referred to the Judge in Chambers to decide what should be done as regards the boy, and that application is still before the Judge at Chambers, except to this extent, that she had access given her by the Judge at Chambers to the children. That being the position of matters here, again can I say there has been that wilful breach on the part of the husband of his covenant which is to deprive him of the right of coming before the Court and getting the deed enforced? I think not. My opinion of what has been done, as far as the Defendant is concerned—namely, putting the Court in motion to do that which the Court only could do—is not such an act of misconduct on his part as deprives him of the benefit of the agreement, and therefore I hold that the Plaintiff has committed no material breach of the covenant. As regards the form of the injunction in this case I propose merely to grant an injunction to restrain Mrs. *Besant* from taking any action or other proceeding for the purpose of compelling her husband to cohabit with her. As regards the injunction, it must be remembered that you cannot restrain a pending motion, but you can restrain a person from instituting proceedings; and there is another consideration which strongly favours the view that the injunction ought to be granted: Under the *Judicature Act*, if the lady had been desirous, as she was not, of returning to cohabitation, she might by counter-claim have claimed a right then and there, and then the deed could have been pleaded as a defence to the claim. There was no difficulty in so pleading if she had thought fit to do so; but she took the other alternative of asking for judicial separation. Therefore there seems to the Court reason for granting the injunction. She ought not to have the opportunity of raising this contention when and where she likes, but when brought face to face with her husband she should be compelled to say which course she would adopt—whether she would return to cohabitation or live separate and apart.

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There only remains one other matter. I am by no means prepared to say that I cannot make a married woman pay the costs. I can make her separate property liable for payment. Therefore it is not on any ground that she is not liable to pay that I am going to make the order I am about to do; but I think the husband has certainly occasioned to the wife costs which ought not to have been occasioned. What happened was this: when the case was before me on the former occasion the lady said that she had a case for judicial separation. I suggested it was a pity there should be two suits, as this Court is now competent to decide those questions, and that, as probably the case would go to appeal, it would be more convenient to raise the matter by counter-claim and dispose of the whole matter at once. Then there would be but one public exhibition—but one hearing in this Court, and one hearing on the appeal; and the lady acceded to the suggestion, and it was arranged that she should amend her counter-claim by stating her case for judicial separation. She did so, and then the case came on for trial. It has been on the paper several days before it was reached. Of course that adds to the expense, and she has brought up witnesses whom she has considered important to support her case, and kept them here at considerable expense. When the case came on for trial the counsel for the Plaintiff put forward an objection in the shape of a demurrer. After hearing the facts and looking into dates, I considered that I ought to come to the conclusion to allow it. All the expense incurred by the lady with regard to witnesses has been entirely thrown away, and thrown away through the action of the Plaintiff, who prevented the issues of cruelty being tried by me. That being so, I do not think I ought to measure the costs very exactly, or to say that he ought to pay a part of the costs and obtain a part from the wife. I think a fair course to take under all the circumstances is for me to say I shall make the order without costs. The Plaintiff must, however, pay the trustees £10 for their costs.

Solicitors for the Plaintiff: *Scott, Jarmain, & Trass*, agents for *B. B. Dyer, Boston.*

Solicitors for the Trustees: *Stibbard, Gibson, & Co.*

M. R.
1879
April 3.

Ex parte McPHAIL.

Practice — Service out of Jurisdiction — Rules of Court, 1875, *Order* XI., *rr.* 1, 1*a.*

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A charterparty having been entered into in *Scotland* between the Plaintiffs and a shipowner, both parties being resident in *Scotland*,—on an *ex parte* motion to restrain the shipowner from dealing with the ship, which was then at a port within the jurisdiction, in a manner alleged to be inconsistent with the charterparty:—

Held, having regard to the discretion given to the Court by Rules of Court, 1875, Order XI., rule 1a, that it was not a case in which the Court would grant an injunction or direct service of the writ out of the jurisdiction.

THIS was an application on behalf of *Hugh McPhail & Co.*, who were resident in *Glasgow*, to restrain *Matthew Lowden*, a shipowner, who was also resident in *Glasgow*, from dealing with a steamship called the *Elgina* in a manner inconsistent with an agreement entered into between the parties at *Glasgow* in December, 1878.

By this agreement *Lowden* agreed with the applicants to let them have the *Elgina* for four trips from *Glasgow* to *Limerick* on the terms therein mentioned, the applicants to have the option of keeping the vessel for other four trips on giving fourteen days' notice, the steamer to be loaded and discharged at both ends without any loss of time. The *Elgina* performed seven of the eight trips from *Glasgow* to *Limerick* and back, and the payments were made to *Lowden* according to the terms of the agreement. She took in the cargo at *Glasgow* supplied by *McPhail & Co.* for her eighth trip, and discharged the same on the 25th of March, 1879, at *Limerick*, where a cargo was tendered by *McPhail & Co.'s* agents for the return voyage, but the captain declined to take it, on the ground that his master had instructed him not to take any goods on board for *Glasgow*, but had ordered him to proceed to *Cardiff* for orders as soon as his cargo was discharged.

The *Elgina* then left *Limerick* without a cargo, and had arrived at *Cardiff*, where, as was alleged, it was intended that she should remain for several days and then proceed on another voyage not contemplated by the agreement.

The applicants were about to commence an action against *Lowden* for a breach of the charterparty, but had not yet issued the writ. They now moved for an injunction as before mentioned, alleging that no local Court of limited jurisdiction in *Glasgow* would have jurisdiction to restrain the intended Defendant from dealing with the ship.

Solomon, in support of the motion, submitted that, under Rules of Court, 1875, Order XI., rule 1a, the Court had jurisdiction to grant the application, and that this was a proper case for its exercise; also that the Court could grant an injunction though no writ had been issued.

Hornell (*amicus curiæ*) referred to the following cases with reference to the practice of the Court in granting an interim injunction before the issuing of a writ: *Carr* v. *Morice* (1); *Thorneloe* v. *Skoines* (2); *Young* v. *Brassey* (3).

JESSEL, M.R. :—

I have arrived at the conclusion that I ought not to grant an injunction.

The large powers originally given by Order XI., rule 1, for allowing writs in actions commenced in *England* to be served in *Scotland* in cases which might very well have been commenced in *Scotland*, had caused great dissatisfaction there, and for that reason rule 1a was drawn by a Committee of Judges of which I was chairman. That rule provided that the Judge, "in exercising his discretion as to granting leave to serve such writ or notice on a Defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the Defendant, if resident in *Scotland* or *Ireland*, of a local Court of limited jurisdiction having jurisdiction in the matter in question, and to the comparative cost and convenience of proceedings in *England* or in the place of such Defendant's residence."

Now see what this case is. The contract was made in *Glasgow*

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(1) Law Rep. 16 Eq. 125. (2) Law Rep. 16 Eq. 126.
(3) 1 Ch. D. 277.

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between two persons resident in *Glasgow*, and the sole Defendant and the sole Plaintiffs in the intended action are *Glasgow* men. The subject-matter is a ship, a chattel wandering about, making voyages to *Ireland* and back. The injunction asked for is a personal remedy against the Defendant and no one else. Why may it not be obtained in *Scotland?* The order of the Scotch Court could be enforced on the master of the ship at *Cardiff* as easily as an order of this Court. There would be the same remedy and the same power of attachment. I am of opinion that, both on the score of cost and convenience, the proceedings had much better be taken in *Scotland*, and that I should be interfering with the jurisdiction of the Courts there if I were to grant an injunction. Therefore, in the exercise of the discretion given me by the new rule, I refuse the proposed Plaintiffs liberty to serve the writ out of the jurisdiction.

Solicitors: *Ingledew, Ince, & Greening.*

M. R.
1879
June 28.

In re ADAMS' TRUST.

Bankruptcy of Trustee—Removal from Trusteeship—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 117.

Where a trustee having, either solely or jointly with others, control over the trust property has recently become bankrupt, and it is not shewn that he has since become possessed of means, the Court will, as a general rule, order his removal on the petition of the *cestuis que trust*, under sect. 117 of the *Bankruptcy Act*, 1869.

THIS was a petition under sect. 117 of the *Bankruptcy Act*, 1869, for the removal of *F. Wheelwright*, one of the trustees of the will of *Louisa Adams.*

The testatrix, by her will, gave the messuages therein mentioned to her trustees, *Robert Shuttleworth* and *Frederick Wheelwright*, upon various trusts as to the several messuages during the respective lives of her two daughters and their husbands, including trusts to pay the rents and profits to such daughters and their husbands respectively, or to permit them to receive the same, and after their respective deaths upon the trusts therein declared for the benefit of their respective children; and she bequeathed the residue of her property to her trustees in trust for her two daughters. The will contained a power for the trustees, with the consent of her daughters as regarded the property in which they respectively took an interest during their respective lives, and afterwards at the discretion of the trustees, if and when they should think fit, to sell, call in, and convert into money all or any part of the real, leasehold, or personal estate of the testatrix, and to invest the proceeds of such sale and all other trust moneys under her will in manner therein mentioned. The will contained a power exerciseable by the continuing trustee for the appointment of a new trustee in the place of a trustee desiring to retire from, or refusing or becoming incapable to act in, the trusts.

The testatrix died in December, 1877, being possessed of the messuages mentioned in her will and of money at her bankers.

On the 9th of August, 1878, *Wheelwright* filed a petition for the liquidation of his affairs by arrangement in the *Birmingham* County Court, and at the first meeting of his creditors a composition of 1*s.* 1*d.* in the pound was agreed to, payable in January, 1879. His assets were under £60, including his furniture. He had since commenced business as a photographer.

The *cestuis que trust* under the will had requested *Wheelwright* to retire from the trust, and had written to him to that effect before the petition was presented. His co-trustee also objected to his remaining in the trust. He declined, however, to retire.

The present petition, presented by the two daughters of the testatrix and their husbands, and by the infant children who were interested under the will, by their next friends, prayed that *Wheelwright* might be removed and another trustee appointed.

Chitty, Q.C., and *Woodroffe*, for the Petitioners, referred to the *Bankruptcy Act*, 1869, s. 117, and to *In re Barker's Trusts* (1).

Waller, Q.C., and *Godefroi*, for *Wheelwright*, the trustee sought to be removed, contended that this was not a case in which the jurisdiction given to the Court by sect. 117 of the *Bankruptcy Act* ought to be exercised. There was nothing to shew that the Respondent was likely in any way to misappropriate or injure the trust property. There was no case in which, in the absence of misconduct, when there had been a liquidation by arrangement which had come to an end by the acceptance of a composition by the creditors, a trustee had been removed.

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(1) 1 Ch. D. 43.

They referred to *In re Renshaw's Trusts* (1) and *In re Bridgman* (2).

JESSEL, M.R.:—

The question raised in this case is as to the meaning of the discretionary power which the Court possesses of removing a bankrupt trustee, including in that term a trustee who has liquidated by arrangement, and who is subject to the same jurisdiction.

Now bankruptcy by itself is not an evidence of crime or of misconduct, for although I agree with what was said by a great philosopher and lawyer, that "Misfortune is very often another name for imprudence," yet there are cases where it is not so, and we have had recently instances in which persons merely from ignorance of law have been reduced in circumstances and even ruined when they thought they were making a prudent investment. There can be no doubt that the discretionary jurisdiction given by the Act of Parliament was not founded upon any notion of unfitness for being a trustee from misconduct. Then what was the notion? Evidently this, that the honest man would have no property left, and would have begun the world again with nothing. That is putting it most favourably for the bankrupt by assuming that he is an honest man; for if he were a rogue, of course no one would suggest that he should remain a trustee of any will or settlement whatsoever. That being the case, the man who has recently been a bankrupt starts again in the world utterly destitute, while if he is trustee of an ordinary settlement, whether by will or deed, he has control over property, or he may, as in this case, be entitled to receive rents of houses or lands; or he may be entitled to receive money as such, as in this case, when there is money in the bank; or he may be entitled to receive money for

(1) Law Rep. 4 Ch. 783.

(2) 1 Dr. & Sm. 164. 6 Jur. N.S.

investment: in one way or another there are very few trusts (although, no doubt, there are some) in which the trustee cannot receive property, and these observations do not apply only to the case of a sole trustee, for in very many cases one of two trustees can receive money, and even where there is another trustee or other trustees joined with him he may, by the death or deaths of the other or other trustees in his lifetime, become the sole trustee, and in that way have the control of the trust property.

It appears to me, therefore, that as a general rule, where the bankruptcy is recent, and where it is not shewn that the man is of good character and has the command of means, he ought to be removed. I say where it is not shewn that he has the command of means, because a man who has recently become bankrupt may afterwards have become wealthy, either by a fortunate speculation or by the bounty of others. He may have had a large property left to him, or he may have been appointed to a lucrative post, bringing him in a large income. Therefore, when you get rid of the presumption that he is impecunious, of course you also get rid of the reason upon which the jurisdiction of the Court rests.

Now, that this was the opinion of Vice-Chancellor *Kindersley* I think is plain from what he said in the case of *In re Bridgman* (1). He says: "The object of the Legislature in passing the Act of 6 Geo. 4, c. 16, s. 79, and subsequent statutes relating to bankrupt trustees, was, that, inasmuch as a trustee has under his control the trust property, it is important that such property should not be in the hands of a trustee who, by reason of his bankruptcy, is in a reduced state of circumstances." I go a great deal further than that, for he ought to be, if he is an honest man, quite destitute, although he may be able to start again, either through obtaining a good appointment or a fortune. Now that being so, the case which the Vice-Chancellor had to deal with was not a recent bankruptcy, but a bankruptcy five years before the presentation of the petition, in which the man had obtained a first class certificate four years before the presentation of the petition—a first class certificate then being a testimonial that the bankruptcy had occurred through misfortune. He had been appointed to the clerkship of a County

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(1) 1 Dr. & Sm. 167. 6 Jur N.S. 1048

Court at *Tavistock*, with an income of £800 a year, which he had held ever since; he was a solicitor in good practice earning money, and he was actually a creditor of that very trust for many thousands of pounds, he claiming upwards of £12,000, and the *cestui que trust* admitting that at least £10,000 were due to him. Of course, in that case, it was proved that, so far from his being impecunious, he was, if not a wealthy man, a man of considerable means, that through the lapse of time, and probably through other assistance, he had acquired since his bankruptcy means which enabled him to say that the reason upon which the jurisdiction was founded no longer applied to him. I have no doubt, when I have such a case to deal with, that I shall arrive at the same conclusion as that at which the Vice-Chancellor arrived in that case.

But the case I have to deal with is very different indeed. In the first place it is plain that the man now has little or nothing. He was, I will not say a bankrupt, but a liquidating debtor in August last. His assets were very small, the total sum, as I see, being between £50 and £60, including his furniture; therefore he was in a very poor way before the liquidation. He arranged for a composition of thirteen pence in the pound, which he was to have three months to pay, and which if he had duly paid he could not have paid off before the beginning of this year. He does not allege that he has any means whatever except in the exercise of his business, or profession as he would probably call it, of a photographer, and he does not purport to have acquired any substantial property by the exercise of that pursuit at the time when this petition was presented. I therefore have to deal with the ordinary case of a man who ought to have and who probably has little or nothing.

In the next place there are rents to receive and moneys to be invested belonging to this trust which ought to pass through his hands jointly with those of his co-trustee.

In the third place I have the co-trustee saying that he objects to the risk of this, and to the danger of having to act with a man in these poor circumstances. In the next place we have this circumstance, that all the *cestuis que trust* who are of age, and all the next friends of the infants, are unanimous in desiring to get rid of

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this trustee. Considering the whole of the matter, therefore, I am clearly of opinion that this gentleman ought to be removed; and as he was requested to retire before the petition was presented, and was asked to retire by letter, and has obstinately refused to retire, and as there was no occasion to come to the Court if he had retired, because a new trustee would then have been appointed under the trusts of the will in his place, I think I ought not only to remove him, but that I ought to order him to pay the costs of the petition.

There will be a vesting order vesting the estate in the new trustee jointly with the continuing trustee.

Solicitors: *Robinson, Preston, & Stow*; *Austen, De Gex, & Harding.*

JOHNSON *v.* CROOK.

[1879 J. 13.]

M. R.
1879
June 30.

Will—Words—Actually Received—Gift over on Death of Legatee "before he shall have actually received his Share whether the same shall have become payable or not."—Gift not Void for Uncertainty.

Bequest of share of residue to *K.* and *G.*, "but in case *K.* shall die before he shall have actually received the whole of his share and without leaving issue living at his decease, then and in such case, and whether the same shall have become due and payable or not, such part or parts as he shall not have actually received to be paid to *G.*" *K.* died unmarried, without having received any share of the residue:—

Held, that the gift over was not void for uncertainty, but took effect.

Martin v. *Martin* (1) disapproved.

Minors v. *Battison* (2) commented on.

13 Ch D 517,
523
W N (80) 136
18 Ch D 218, 22
217
— 634-5-8

SPECIAL CASE.

Margaret de Manneville, by her will, dated the 2nd of December, 1833, devised and bequeathed all her real and personal estate to trustees upon certain trusts whereby certain property described as "the *Great Bolton* property" would not form part of her residuary estates during the lives of two persons in the will named and the longest liver of them, and for a period of twenty-one years from the decease of such longest liver, but with an ultimate direction that her trustees should stand possessed of the same property upon the trusts thereinafter declared of the residuary estate: and, after certain specific bequests, as to the residue of her property, the testatrix directed that the trustees should sell and convert into money all such parts of the residuary estate and stand possessed thereof and the income until sale, upon trust to pay the annuity and other sums in the will specified, and subject thereto to raise and retain the sum of £8000 to be held upon the same trusts as the *Great Bolton* property, and pay the legacies and weekly sums therein specified (including a legacy of £1000 to *Thomas Keeling* and £400 to *Joseph Gill*, which were respectively paid to them); and from and after and subject to the payment of the legacies and sums of money thereinbefore given the testatrix directed that the trustees should apply the same as follows:—

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(1) Law Rep. 2 Eq. 404.

(2) 1 App. Cas. 428.

"To pay, assign, and transfer the residue of the moneys to be produced by the sale or sales hereinbefore directed, and all the rest, residue, and remainder of the moneys, property, and effects over which I now have or shall hereafter have a power of appointment or disposition as aforesaid and not hereinbefore particularly or effectually appointed or disposed of, and also such of the legacies (if any) as may lapse by the death of the legatee or legatees hereinbefore named in my lifetime, or otherwise become void (but subject to all other the legacies hereinbefore bequeathed or appointed and directed to be paid), unto and equally between the said *Thomas Keeling* and the said *Joseph Gill* and their respective executors and administrators as tenants in common. But in case the said *Thomas Keeling* shall depart this life before he shall actually have received the whole of his share of the said residuary moneys, effects, and premises, and without leaving any issue of his body living at his decease or born in due time after, then and in such case, and whether the same shall have become payable or not, I direct, limit, or appoint that his share of and in all the aforesaid residuary moneys, effects, and premises, or (as the case may be) such part and parts thereof as he shall not have actually received as aforesaid, shall be paid, assigned, and transferred unto the said *Joseph Gill*, his executors, administrators, and assigns."

The testatrix died in 1843.

Joseph Gill, one of the residuary legatees under the will, died in 1847.

Thomas Keeling, the other residuary legatee, died in 1850 without having been married. The Plaintiff was his executor.

Neither *Joseph Gill* nor *Thomas Keeling* during their lives ever received any part or payment on account of the residuary estate of the testatrix, or of the income thereof, or of the proceeds of sale thereof.

The Plaintiff, as representing the estate of *Thomas Keeling*, contended that the gift over of his share was void and inoperative.

The Defendant, *Samuel Gill*, the surviving executor of *Joseph Gill*, contended that the gift over did take effect, and that the whole of the residue went to the estate of *Joseph Gill*.

Davey, Q.C., and *Byrne*, for the Plaintiff:—

The gift over is void for uncertainty. The words are: "in case the said *Thomas Keeling* shall depart this life before he shall actually have received the whole of his share of the said residuary moneys, effects, and premises, and without leaving any issue of his body, then and in such case, and whether the same shall have become due and payable or not," his share, "or such part thereof as he shall not have actually received," shall be paid to *Joseph Gill*. If the words had been "entitled to receive," the case would have been different, but we submit the gift over cannot take effect.

The actual receipt of money payable under a will is in itself uncertain, because it may depend upon the diligence or dilatoriness of the executor. This was the view of Vice-Chancellor *Wood* in *Martin* v. *Martin* (1). There, after a bequest to the testator's nephews and nieces, there was a gift over of their shares if they should die before the testator, or before they should have actually received what was to go to them under the will. The same view seems to have been taken in the House of Lords by Lord *Selborne* in *Minors* v. *Battison* (2).

There are, no doubt, some earlier cases which may be relied on in support of the contention of *Joseph Gill's* representative, and one more recent case, *Whitman* v. *Aitken* (1); but we submit that they are distinguishable from the present. The decision of Lord *Eldon* in *Gaskell* v. *Harman* (2), in which the case of *Hutchin* v. *Mannington* (3), before Lord *Thurlow*, was discussed, was a very peculiar one and cannot be taken to govern the present case. In *Law* v. *Thompson* (4) there is a *dictum* which is opposed to the Plaintiff's view, but it was not necessary to the decision of the case. The effect of the opposite construction would be that the rights of parties would be made to depend upon the diligence of executors.

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(1) Law Rep. 2 Eq. 404.

(2) 1 App. Cas. 428.

Chitty, Q.C., and *Marcy*, for the Defendant *Samuel Gill*, the representative of *Joseph Gill*, were not called upon.

Armistead, for the Trustees.

JESSEL, M.R. :—

The first question I have to decide is what the will means. Then I have to decide whether or not I am at liberty by law to give effect to the will as it stands.

Now, as to the will, I really think, speaking of course of the impression on my mind, that there is no doubt whatever. [His Lordship then stated the material parts of the will.]

It does not appear to me to be doubtful that "actually received" means "actually received." I really do not know how you can translate the words better, because it goes on "whether it shall be due and payable or not," and consequently the testatrix has given over property in the event of a man dying without leaving issue living at his death—for "born in due time afterwards" is included in that in law—to somebody else. That is the meaning of the will.

The only question I have to decide is whether the law will allow effect to be given to this will. Now, there is no statute law or common law to prevent it. If there is anything to prevent it, it must be found in some law manufactured by the Judges in the equity jurisdiction. Of course, if there is such a law clearly established, I must follow it, but I have to discover whether there is such a law. I may observe in passing that the will does not militate in the least against the rule preventing alienation, because it only applies to what he does not receive. Though in theory a man may dispose of that to which he is entitled and does not receive, yet it is not the actual disposition of the property but mere potentiality of alienation before he receives it, and, therefore, the rule as to alienation that says that which a man has he may dispose of does not apply to such a case as this.

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(1) Law Rep. 2 Eq. 414.

(2) 11 Ves. 489.

(3) 1 Ves. 366.

(4) 4 Russ. 92.

Considering the matter *à priori*, why should not a testator be allowed to annex this condition to a legacy? What is there in it against public policy? Why should a man be necessarily entitled to dispose of that which he has not got? I do not see why. Again, what is there uncertain in an actual receipt? I should say there is nothing more certain in this world than the actual receipt of money as a fact easily ascertained. It is perfectly certain. The point which seems to have struck the Judges as a difficulty is this: Supposing the receipt is prevented by fraud, accident, or mistake, what are the rights of the parties? It may well be that in that case the usual rules of equity, and the same results, may follow; and if fraud, accident, or mistake had occurred, and that has been the case in two of the decisions as I shall shew presently, the Courts have said, or, I will say, might have said, dealing with the matter *à priori*, that what the testatrix is contemplating is the non-receipt in the ordinary course of business; and if you shew something out of the ordinary course of business, that is not the meaning of the testatrix, and if the actual receipt has been so disappointed, it means what he has actually received, or what he ought to have received in that sense—not what is paid, but what he ought to have received.

In the present case, however, the testatrix has provided for that; for she says, "whether the same shall have become due and payable or not." So that I have not to consider the possibility of fraud, accident, or mistake. She has considered the very case that it might become due and payable; and that in some way or other, notwithstanding it was due and payable, he might not actually have received it, and then she has given it over. It appears to me that there is no reason why effect should not be given to this will so clearly expressed. Uncertainty, in my opinion, there is none. Difficulty in ascertainment there is none. General policy there is none.

Now I come to the second branch of the case, and have to see whether the law has been established by a series of decisions which make it impossible for me to give effect to this will. Nothing short of that will prevent my giving effect to it.

I will take the decisions as I find them in their natural order, that is the order of date. The first is the case of *Hutchin* v. *Mannington* (1), before Lord *Thurlow*. There the gift was by a man who recited that his fortune consisted of money vested in securities in the *East Indies*. He gave various legacies, with a clause directing "If the legatee should die before he or she 'might have received the legacy' it should go to the children;" and the same as regards the residuary legatee. Lord *Thurlow* said (2): "Suppose any of these legatees had died within a year after the testator, there might then have been some ground for saying, that the testator alluded to the known practice of the Court to compute interest upon legacies from a year after the death of the testator. I rather believe he had some such purpose, as you attribute to him, in his contemplation. There is a faint indication of a purpose, that there shall be some time or other, when these interests shall go over, and that they shall not vest in the meantime." It seems to me to be a divesting clause, but this does not matter. Then he says: "But has he conceived that intention, and expressed it with such definite certainty, that I can act upon it?" That was the point he was considering. "I am to compute, what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain." So he held the words "may have received" to be equivalent to receivable or *de jure* receivable. He must have held it so. Then he goes on, "Suppose they lived, and claimed their legacies: they must have been computed with interest from a year after the death of the testator, if no other time was appointed. If he had given any time, I agree that the intention is to prevail, if it can be found out; (though a testator cannot make an executor answerable for interest beyond what the law has done) but he must give me some rule to go by. Suppose he had

(1) 1 Ves. 366.

(2) 1 Ves. 367.

given a real estate in the manner you specify, it is clear that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness: in some way it may be sold immediately: but I should not inquire when a real estate might have been sold with all possible diligence." Now if he had had to consider a will which had said, a man shall not take unless he survives the sale, and that whether the sale ought to have taken place or not, Lord *Thurlow's* difficulty would not have existed. He says: "In this case it is an immeasurable purpose. I can do nothing with it; and it must be considered as vested from the death of the testator." I think it is clear from that judgment of Lord *Thurlow's* that he was not meaning to lay down any rule of law, but he was simply construing the will, and he was unable to find out from the will that the testator meant before it is actually received. "May have received" might mean receivable, and he thought that was too indefinite.

The next case is before Sir *W. Grant*, in 1803, of *Elwin* v. *Elwin* (1). That was a case of a gift over on death before the sale should be completed. It is not exactly in point, but it is in point in one way, because after citing the observations of Lord *Thurlow*, Sir *W. Grant* says this (2): "As a general proposition that may be admitted to be true: but, that it must be so universally, would deny the testator the power by any express form of words or clear manifestation of intention to make it depend upon the actual sale. That Lord *Thurlow* could not mean it in so unqualified a sense will be evident from a decree of his, which I shall state; to which the proposition refers." That was a decree which gave over property on death before sale when the proceeds should be received. But Sir *W. Grant* decided that it was a good gift over if it was death before sale; and of course you may say that a man cannot intend the interest of the legatee to depend on the diligence or want of diligence of the trustees in endeavouring to sell, and the good or bad faith of the purchaser in completing or refusing to complete a sale, or his means, or on an accident; but if he says "on the death of any legatee before the sale," by whatever means that sale is delayed, caprice, accident, mistake, fraud, anything, it shall go over; as Sir *W. Grant* says there is nothing to prevent it; and he is of opinion that that is so plain that he is quite satisfied that Lord *Thurlow* could not have meant it. Therefore here again you have authority, one authority by Lord *Thurlow* himself, and another by Sir *W. Grant*, explaining that there is no law established that it cannot be done, only that it must be clearly expressed. That is the effect of *Elwin* v. *Elwin* (1).

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(1) 8 Ves. 547.

(2) 8 Ves. 556.

I come now to the next case, which is certainly a very great authority, not only because it is a decision of Lord *Eldon*, but because it contains a discussion of what took place before Lord *Thurlow*. If there had been a difference of opinion between them, the subsequent opinion would have overruled the prior one. It is the case of *Gaskell* v. *Harman* (2), where Lord *Eldon* says this: "I admit the soundness of the proposition, appearing by the report to have been stated by the Master of the Rolls; that, if a testator thinks proper, whether prudently or not, to say distinctly, shewing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies, or the residue, unless they live to receive them in hard money, there is no rule against such intention, if clearly expressed." Now, I think I may say certainly there was no rule established by Equity Judges up to the year 1805, when those terms were made use of by Lord *Eldon*. Then he says: "In the case of *Hutchin* v. *Mannington* (3), I admit, I thought the meaning of those words was, what they shall have received; and I thought so even after the decision. The use I have since made of that case is as an authority, that, if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him." That is all. If the words are ambiguous and bear two meanings, you shall impute to the testator that he meant receivable in the one sense of being entitled to receive, and not entitled to receive in the sense of actual receipt.

The next case on the subject is the case of *Law* v. *Thompson* (4). That is a decision of Sir *John Leach*. What he says about the case of *Hutchin* v. *Mannington* is this: "In the case of *Hutchin*

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(1) 8 Ves. 547.
(2) 11 Ves. 489, 497.
(3) 1 Ves. 366.
(4) 4 Russ. 92, 100.

v. *Mannington* (1), Lord *Thurlow* considered that the words used as to the death of the legatee were too vague to express a definite time upon which he could act with certainty: but Lord *Eldon*, who was counsel in that cause, has in the discussion of other cases frequently stated, that he was, at the time of the argument, and continued to be, of a different opinion, and that the only use he had made of that case was, to consider it as an authority for the principle, that the intention of the testator in similar cases must be clearly expressed." After dismissing the case before him, in which he carried out the law as applicable to the gift over, which he did not hold void, he had to discuss this question—whether, if the neglect of the executor prevented its being received, the man was entitled. He had not those words "whether due or payable" or not. The testator had not provided for that event, and Sir *John Leach* thought he could provide for it, and he considered in that case that if the delay had occurred through the neglect of the executors, the legacy was still payable—that that was an event not contemplated by the testator. It was, therefore, I may say, receivable; it was actually received, or ought to have been received. That is how he read the words, and he went on (2) in this way: "If, however, the executors named in the testator's will, having taken upon themselves the administration of his estate, could, with reasonable diligence, have collected it, and remitted the produce to his father in his lifetime," (that is, the infant's father) "I should be of opinion that the rights of the father could not be defeated by the accidental circumstances of this case: and, upon that principle, it must be referred to the Master to inquire, whether, if the will had been proved by the executors named in it, and reasonable diligence had been used by them, any and what part of the testator's property, given to the father, could have been remitted to him in his lifetime." That was, therefore, a decision, not a *dictum*, carrying out the words of the gift over, but qualifying them as a question of construction or as a question of relief in Equity (I don't know which) by this, that the neglect of the executors was not to prejudice the first legatee. Up to this time, therefore, I can find no trace of any alteration in the law, and we have got down now to the year 1827.

(1) 1 Ves. 366.

(2) 4 Russ. 101.

M. R.
1879
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v.
CROOK.

The next case on the subject which it is necessary to notice is a case of *In re Arrowsmith's Trusts* (1). The testator directed in case of the death of any of his nephews and nieces before receiving any of their respective shares, that the same should go over to the survivor. Vice-Chancellor *Kindersley* held that nephews and nieces who lived a year took absolutely after the testator's death, but those who did not lost their legacies, or rather their representatives did. But when it came before Lord Justice *Turner* he seems to have been of opinion that that was not the right view. He did not actually decide it, but Lord Justice *Knight Bruce* agreed with the Vice-Chancellor, and Lord Justice *Turner* evidently thought that it meant actually received. That was a question of construction, but the point upon it is this—whether the law could have been carried out. He says this (2): "As to the share of *Jane Hartnell*, who died shortly after the testator's death, it makes very little difference to the other claimants, whether her representative receives a share or not, and it has been agreed that she shall receive it." He gave it up to her notwithstanding the Vice-Chancellor's decision. Then he goes on to say this: "It therefore becomes unnecessary to express an opinion as to her title, but if it were necessary to give an opinion upon that point, I should be disposed to think that the order of the Vice-Chancellor should be modified by directing an inquiry, whether any part of the fund was received, and could properly, having regard to the state of the assets, have been paid over within the year." That is, he agreed with the Vice-Chancellor and the other Lord Justice in thinking that the word "receivable" in that case meant receivable *de jure*, as they call it, that is, having a right to receive; but he would not go the length of saying that a legatee who died within the year lost the legacy, because, he said, you have a right to receive if there are assets to pay you. The delay of a year is not an absolute delay. He says: "The executors, according to the general rule, might have paid it, but the Vice-Chancellor's decision, that the gift over takes effect on death within the year, would prevent their making any payment within that period." Then he says: "I agree with the Vice-Chancellor that the shares did not vest indefeasibly on the testator's death, and I do so on the

(1) 2 D. F. & J. 474. 7 Jur 259.

(2) 2 D. F. & J. 480.

following grounds. The expression 'die before receiving their respective shares' can only apply to nephews and nieces who were pointed out as objects of gift, but the gift is, in express terms, confined to nephews and nieces living at the testator's death. He therefore, when he speaks of their dying before they receive their shares, cannot have been contemplating their dying in his lifetime. There are two periods to which the words may refer, the period when the fund was actually got in, or the period when it could have been paid over to the legatees. To refer them to the former period would be a most inconvenient construction"—not an illegal construction, be it observed—not one prohibited by law —"and I am, therefore, disposed to think, that if it were necessary to decide the question, the proper course would be to direct an inquiry when the specifically bequeathed moneys could have been paid to the legatees." I think I am entitled to say that up to the year 1860 there was no law prohibiting effect being given to this will.

I now come to a modern case decided in the year 1866, and it is the first time I find any Judge stating that there was any law to prohibit such a will being carried into effect. Having examined, not only the authorities I have mentioned, but some others to which I have been referred, and have found myself, I may say, I cannot find a trace of it before the case I am about to mention, and therefore if there is such a law it must have been made in the year 1866. Now it could only have been made in the year 1866 by statute, because, in the year 1866, Equity Judges did not profess to make new law, and when they state what the law is, they do not mean, as might have been said two or three centuries before, that that was law which they thought ought to be law.

It is not suggested that there is any statute, but what I find Vice-Chancellor *Wood* saying in *Martin* v. *Martin* (1) is certainly to the effect that the law prohibits it. There the gift over was: "And if either or any of my nephews and nieces should die before me, or before they shall have actually received what is to go to them under this will," then to go over. Then he says: "When I say, 'never receive that share,' it presents itself to the testator's mind in two ways—'They may die before me, or, though they may

(1) Law Rep. 2 Eq. 404, 411.

survive me, they may die before the shares are paid over to them.' I have no doubt that was in his mind; and, if the law could effect it, operation ought to be given to the clause." All I can say about it is, being clearly of opinion that the Vice-Chancellor did not arrogate to himself in 1866 legislative powers, and there being no statute, and there being no prior cases which say the law will not allow it, but there being a great many prior cases saying the law will if it is clearly expressed, that it was simply a mistake of the Vice-Chancellor, and that is how I shall treat it. It is only in 1866, and all the authorities are the other way, and there being neither statute nor common law to be cited against it, the statement that the law will not allow it must have been made *per incuriam*. The respect and esteem I have for that learned Judge is such that if he were here he would know that in attributing to him a mistake I should not be attributing more to him than I should to myself, and have done more than once—it is simply a mistake. What makes it more singular is that the very next case in the volume, decided by Vice-Chancellor *Stuart*, *Whitman* v. *Aitken* (1), and which was decided three months before *Martin* v. *Martin* (2), is the other way. It is very curious. Whether or not the *ratio decidendi* was such as I should altogether follow it is not necessary for me to say; all I do say is, that neither the counsel nor the Court saw any difficulty in the law; they treated it as a mere question of construction, and it was so decided; and, therefore, though I agree that the other is a later one in point of date, yet it does not much affect what I said about the law.

Now, the only other case is a case of *Minors* v. *Battison* (3). The point did not arise directly, it was discussed by some of the Lords in arriving at a conclusion as to the true construction of the will. The question on the will was, whether there was a trust for sale at a given period? and so little did the point arise directly, that in the rather elaborate note at the head of the case it is not even mentioned. But in some of the speeches something is said which I must say is very difficult to understand. In the first speech of Lord *Chelmsford* I find this passage. There was a gift over, before they received their shares. One of the children was

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(1) Law Rep. 2 Eq. 414.

(2) Law Rep. 2 Eq. 404.

(3) 1 App. Cas. 428.

William Hobson, and Lord *Chelmsford* says (1): "If, as I have said, *William Hobson's* share was vested at the time of the wife's decease, the clause as to children receiving their share can only be regarded as a divesting clause, and is either repugnant, as after vesting a share could not be divested, or it must mean, not before actually receiving it, but before becoming entitled to receive it."

I am no *Œdipus*, and I do not understand the passage. It cannot be right as it stands; but what was intended to be conveyed by the learned Lord I do not know. Lord *Hatherley* was the next Lord who made a speech, and he does not notice the point at all. Then Lord *O'Hagan* was next, and he does notice it. He says (2): "It is to be noted, that the literal meaning of the words we have to construe is not insisted on. The provision that if any of the children shall die 'before he or she shall have received his or her share' of the trust estate is not interpreted, in the judgment under appeal, as if it meant to point to an actual receipt of the share, as in the case of *Martin* v. *Martin* (3), which is very different from that before us. The word 'received' is held by the Lords Justices, and rightly held, to have the meaning of '*de facto* received or *de jure* receivable'"—that means shall have been actually received or entitled to receive—"And if such an interpretation be admissible, the only question really is, at what times were the shares *de jure* receivable?" That part of it only goes to the question of construction, but the words in that case were properly construed as meaning entitled to receive. Then he goes on (4): "The cases of *Hutchin* v. *Mannington* (5) and *Elwin* v. *Elwin* (6) certainly sustain the conclusion at which I have arrived. In the former, the gift over was defeated, because the purpose was, in the words of the Lord Chancellor, 'immeasurable;' because it was 'all too uncertain.' The uncertainty and difficulty of ascertaining the intent which operated in that case exist, also, in the case before us. In the latter, a different rule was reached, because the intention was declared with a 'definite certainty,' which does not here compel us to an injurious decision."

Those words go to shew that Lord *O'Hagan's* opinion was that there was no law to prevent a decision, but, on the contrary, he talked of being compelled to an injurious decision, that is, to a decision injurious to the interests of the family; but it was clearly his opinion that if the words had been sufficiently strong he would have been compelled to arrive at the decision though it might have been injurious to the interests of the family who took benefits under the will. So far, therefore, as Lord *O'Hagan's* speech goes, it is in favour of the view I have been contending for, that there is no law to prevent the meaning of the will being carried out; but, on the contrary, law compels you to carry it out. Having gone through the speeches of the other Judges I come to Lord *Selborne*, and I must say there are some expressions in his speech which are rather difficult to deal with, which certainly lend some countenance to the argument addressed to me on the present occasion on the part of the Plaintiff.

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(1) 1 App. Cas. 437.

(2) Ibid. 446.

(3) Law Rep. 2 Eq. 404.

(4) 1 App. Cas. 447.

(5) 1 Ves. 366.

(6) 8 Ves. 547.

He says (1): "These points being ascertained, we are brought to the consideration of the divesting clause, introduced by these words: 'And in case any of my said children shall survive my said wife, and die before he or she shall have received his or her share of my said trust estate.' These words, in their *primâ facie* natural sense (from which there is nothing in the context to authorize any departure), relate to the death of a child during the interval between the death of the widow and the time when that child's share might be actually received, or at least *de jure* receivable. It was decided in *Hutchin* v. *Mannington* (2) and *Martin* v. *Martin* (3), that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect." I do not agree that something to that effect was decided in *Hutchin* v. *Mannington.* It was not decided that such a divesting clause, but a differently worded divesting clause, would not do; therefore, "such" must be read "similar"; and in *Martin* v. *Martin* it was not decided that it was too uncertain or indefinite at all, but it was said the law would not allow it to be carried into effect, which is a totally different proposition. Then he says: "Lord *Thurlow* said, in the former of those cases, that it would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell." There is a very good answer to that—he did not say so. If the testator had said so it is not contrary to common sense that a testator may be capricious, if common sense be the ordinary sense of mankind. There is no proposition more familiar to those who read or construe wills. If the testator has clearly expressed a capricious gift, you cannot control the clear expression of intention, and that is nearly all that Lord *Thurlow* meant to say, that it must be made quite clear; and other cases have decided the same thing. Where there are two constructions fairly open, that is, where there is something like what might be called an ambiguity, there the more reasonable of the two is to be adopted, that is, you are not to attribute caprice to a testator where it can be avoided, but nobody has said that the law prohibits a capricious gift being carried into effect. In fact, as I said before, we are but too familiar with capricious gifts in wills, and know they must be carried into effect. Then his Lordship goes on to say, "It might be added that when there is an equitable title vested in possession, without any preceding interest, the possession of the trustee becomes, in the view of a Court of Equity, the possession of the *cestui que trust;* and that there is no sound distinction in principle between the retention of trust property in specie for the benefit of the *cestui que trust* (though directed to be converted by the will) and the actual receipt of that property, in any way consistent with the continuance of a legal estate in the trustee by the *cestui que trust.*" As far as I see that is all he says. Now, I am in very great difficulty to know what he meant. I cannot help thinking that he had not present to his mind those decisions on which I have commented, and that the distinction was not as clear to him as it would have been had the cases been cited and commented on.

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(1) 1 App. Cas. 451.

(2) 1 Ves. 366.

(3) Law Rep. 2 Eq. 404.

Where the gift over is not quite clear, that is, where it is susceptible of two meanings, what has been called received *de jure,* and received in fact, or what might perhaps be better expressed as actually received and entitled to receive, there the presumption of law being in favour of not divesting a gift except there are clear words to take it away, and there being two possible meanings, you are to prefer that which leads to the least inconsistency, or it might be said, as was said in two of the cases, you are to prefer that which is the more convenient of the two. That is quite intelligible, and it is also intelligible that where you have words like those Lord *Thurlow* was dealing with, although Lord *Eldon* disagreed with him in thinking they were indefinite and ambiguous, yet a Judge may say the words "may have received" were not equivalent to "shall have received," and he may have said that "shall have received" was not equivalent to "shall have actually received." But whether that be so or not, they by no means establish the proposition of *Martin* v. *Martin* (1), which, somewhat to my surprise, seems to have been cited with approval by Lord *Selborne*, both at the Bar and in the House of Lords, that there is a law which says you shall not carry that into effect. As I have already said, no Judge ever said so before Vice-Chancellor *Wood* in *Martin* v. *Martin*, and no Judge has ever said so since. That being so, when the testatrix says "actually received" she means "actually received," because she says "whether due and payable or not;" and it does appear to me that I should be now establishing a new law applicable to wills if I refused to give the natural interpretation to these words which are so plain and so clear as not to be the fair subject of controversy. I therefore hold that the interest of *Keeling* was well given over, and that the Plaintiff's case must fail.

Solicitors: *Milne, Riddle, & Mellor*, agents for *Rushton & Co., Bolton le Moors; Gregory, Rowcliffes, & Rawle.*

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(1) Law Rep. 2 Eq. 404.

In re GRIFFITH.
CARR *v.* GRIFFITH.

[1879 G. 128.]

M. R.
1879
July 17.

7 App Ca.
162.

Apportionment—"Trading Company"—"Public Company"—Unincorporated Life Assurance Society—"Periodical Payments"—"Dividends"—Bonus—Surplus Profits—Specific Bequest—Apportionment Act, 1870, ss. 2, 5.

The word "dividends" in the *Apportionment Act*, 1870, includes payments by way of bonus or surplus profits to the shareholders of a public company, even though such payments may be only occasional and not strictly periodical: as for instance, where the payments are made under the deed of settlement of a life assurance society, providing for distribution of a bonus or surplus profits among its shareholders once in every five years, "unless a special meeting of shareholders shall otherwise direct."

The words "trading or other public companies" in sect. 5 of the *Apportionment Act*, 1870, include any public company, but not a private partnership.

A life assurance society, unincorporated, but established in 1843 by a deed of settlement, with a board of directors, £100,000 capital, and list of shareholders, and possessing certain powers and concessions under a special Act of Parliament passed in 1868, *held* to be a "public company" within the meaning of sect. 5 of the *Apportionment Act*, 1870.

A bonus or surplus profits accruing on shares in the company specifically bequeathed by a will dated in 1875, *held* to be apportionable under the *Apportionment Act*, 1870.

WALTER GRIFFITH, by his will, dated the 4th of August, 1875, bequeathed to his son *William Griffith* the ninety shares in the *Star Life Assurance Society* then standing in his, the testator's, name, subject to the payment of future calls thereon: and gave to his, the testator's, son, *Alexander Griffith*, for his own use, any shares in any company that might be standing in his name as trustee for the testator, subject to the calls thereon. And the testator bequeathed the residue of his estate to his trustees and executors therein named, upon trust for sale and division in equal fifths between his four sons, *Thomas Henry Griffith*, *William Griffith*, *Frederick Griffith*, and *Alexander Griffith*, and his daughter *Mary Anna Jones*, the wife of *John Lambert Jones*.

The testator died on the 8th of November, 1875.

At the date of his will and of his death the testator, who was a director of the *Star Life Assurance Society*, was possessed of ninety shares of £25 each in the society standing in his name, and was also entitled to sixty such shares standing in the name of his son *Alexander Griffith* as trustee for him.

The executors having assented to the specific legacy of the ninety shares to *William Griffith*, and of the sixty shares to *Alexander Griffith*, the ninety shares were duly registered in the society's books in the name of *William Griffith*, and the sixty shares were allowed to remain in the name of *Alexander Griffith*.

The *Star Life Assurance Society* was a joint stock company, established in the year 1843, with a nominal capital of £100,000 in 4000 shares of £25 each. Its management was regulated by a deed of settlement which provided for a board of directors, to be elected by the shareholders, and for the transfer of shares by any shareholder, with a clause enabling the directors to refuse to admit on the register any proposed transferee by notice in writing delivered to the vendor of the shares within ten days after the application to register such transferee. By the deed ample powers of management were vested in the directors; and, in particular, it provided that a profit and loss account should be made up once in every five years, and that out of the profits (if any), or out of the capital or funds of the society, until such profits were ascertained, the directors should, in the first place, pay all charges upon such profits; and that, subject thereto, the shareholders should, out of such capital or funds or profits, receive interest at 5 per cent. half-yearly on the amount paid up on their respective shares; and that "subject to the payment of such charges and the interest upon shares as aforesaid the directors shall divide and appropriate one-tenth part of the surplus of such gains and profits amongst the shareholders of the society in a rateable proportion according to the number of shares held by each, and shall make known by circular addressed to each shareholder the amount of such profits apportioned to each shareholder, and the time and place when and where the same may be by him or her received. . . . . Provided that, although the interest as aforesaid shall be paid half-yearly as aforesaid, such division of profits shall be made and take place only at intervals of five years from the first division of profits, unless a special meeting duly convened to consider thereof shall direct otherwise, and then for that time only:" and subject as aforesaid should divide the remaining nine-tenths among the policy-holders.

By *The Star Life Assurance Act*, 1868, after reciting that it was "expedient that the society should be authorized to sue and be sued in their own name, and that other provisions should be made with respect to the said society," it was enacted that all actions and other proceedings for or on behalf of the society might be instituted in the name of the society; that all actions and other proceedings against the society might be instituted against them in their name; that in all criminal proceedings for or on behalf of the society relating to any of their property, it should be sufficient to state such property as belonging to the society: that shareholders might be sued by and sue the society: that in all proceedings in bankruptcy, &c., touching their interests, the society might be represented by their secretary: that a memorial of the names of the directors, trustees and secretary should be enrolled in Chancery, and should be conclusive evidence as to such persons: that the property of the society should, after the enrolment of the memorial, vest in the trustees: that any three of the directors might issue powers of attorney to sue for foreign debts: that the Act should extend to the society at all times: that, except only as expressly provided, the Act should not vary the provisions of the deed of settlement: that the Act should not incorporate the society or their trustees: and that nothing in the Act should restrict the liability of any member of the society.

The last division of the profits of the society amongst the shareholders under the deed of settlement in the testator's lifetime was made for the five years ending on the 31st of December, 1873, and the proportion thereof payable in respect of the sixty shares was paid to *Alexander Griffith* as trustee for the testator, and was accounted for by him to the testator.

On the 3rd of March, 1879, after the testator's death, another division of one-tenth of the surplus profits was made for the five years ending on the 31st of December, 1878, and the society paid *William Griffith* a proportionate part of the amount payable in respect of his ninety shares from the death of the testator to the

31st of December, 1878, but declined to pay him the proportionate part for the period between the 31st of December, 1873, and the testator's death without the consent of the executors. The society, however, paid to *Alexander Griffith* the whole of the proportion of surplus profits payable in respect of the sixty shares standing in his name as trustee for the testator, and he claimed to be entitled to retain the whole amount for his own benefit as specific legatee, but the residuary legatees other than himself and *William Griffith* disputed such claim, insisting that the amount was apportionable, and that a proportionate part thereof from the 31st of December, 1873, to the testator's death formed part of his residuary personal estate.

William Griffith also claimed to be entitled to the apportioned part which the society had declined to pay of the surplus profits payable in respect of his ninety shares, but the residuary legatees other than himself and *Alexander Griffith* disputed such claim, and maintained that such proportion formed part of the testator's residuary estate.

This action was accordingly instituted by the executors, one of whom was the said *Mary Anna Jones*, a residuary legatee, against *William* and *Alexander Griffith* and their two brothers, to have the rights and interests of the parties in the surplus profits for the five years ending the 31st of December, 1878, in respect of the ninety shares and sixty shares ascertained by the Court.

The action now came on for trial.

Bagshawe, Q.C., and *Speed*, for the Plaintiffs, submitted that the *Star Life Assurance Society* was a "public company" within the meaning of the *Apportionment Act*, 1870: *Jones* v. *Ogle* (1); that the surplus profits in question came within the definition of the word "dividends" in the 5th section of the Act, and were consequently apportionable, notwithstanding that the shares were specifically bequeathed. They referred to *Whitehead* v. *Whitehead* (2); *Capron* v. *Capron* (3); *Pollock* v. *Pollock* (4); *Hasluck* v. *Pedley* (5); *In re Cox's Trusts* (6).

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(1) Law Rep. 8 Ch. 192.
(2) Law Rep. 16 Eq. 528.
(3) Law Rep. 17 Eq. 288.
(4) Law Rep. 18 Eq. 329.
(5) Law Rep. 19 Eq. 271.
(6) 9 Ch. D. 159.

The Defendant *Thomas Henry Griffith*, one of the residuary legatees, appeared in person, and took the same view.

Whitehorne, for the Defendant *Alexander Griffith* :—

The first question is whether the division of the surplus profits of the society was a "periodical payment" within the meaning of the Act; for I submit that the Act deals with periodical payments only (sect. 2), and so the Court of Appeal held in *Jones* v. *Ogle* (1). Now, according to the terms of the deed of settlement, the division of profits is to be subject to the discretion of the shareholders, who may, if they think proper, vary the period of division, or even direct that there shall be no division at all. It is, therefore, an uncertain, and not a "periodical," payment. In *In re Cox's Trusts* (2), Vice-Chancellor *Hall* held that a division of profits was not a "periodical payment;" and in *Jones* v. *Ogle* (3), Lord *Selborne*, in delivering the judgment of the Court of Appeal, said that, in order to fall within the 5th section, the payments must be such as "are made periodically, recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and, further, they must be in the nature of income; that is, coming in from some kind of investment." The Act, therefore, applies only to regular income or to payments of that nature, and not to variable or irregular payments such as these.

In the next place, I submit that this society is not "a trading or other public company" within the 3rd sub-section of sect. 5. It is a private trading partnership, originally established and regulated by a deed of settlement, with certain privileges subsequently given to it by a special Act of Parliament, but not increasing its publicity.

[JESSEL, M.R. :—The deed of settlement provides for the transfer of shares to strangers. Without intending to define what is a "public company," I may say that one great distinction between a public company and a trading partnership is the right of transfer of shares.]

The special Act of 1868 did not confer upon the society any

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(1) Law Rep. 8 Ch. 192.

(2) 9 Ch. D. 159.

(3) Law Rep. 8 Ch. 192, 198.

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publicity which did not previously exist. It has never been registered as a public company, and it is an unincorporated company, for the special Act expressly provides that it shall not be incorporated. It is, therefore, a company wanting in the elements of publicity. It is true that in *Macintyre* v. *Connell* (1) the *Union Bank of London*, though unincorporated, was held to be a public company, but that was because it had been established under the special provisions of the Bank Acts.

On every ground I submit these profits are not apportionable.

The Defendant, *William Griffith*, in person:—

In addition to the points urged by Mr. *Whitehorne*, I submit that a division of surplus profits is in the nature of a bonus; and the Court considers every bonus, whether consisting of additional stock or shares or simply of money, as part of the capital, which is, of course, unapportionable: *Brander* v. *Brander* (2); *Irwin* v. *Hewson* (3); *Paris* v. *Paris* (4); *Hooper* v. *Rossiter* (5); *Ward* v. *Combe* (6). Moreover a gift of "shares" carries everything appertaining to them, including all dividends or profits: *Carron Company* v. *Hunter* (7).

The whole scope of the *Apportionment Act*, as indicated by the preamble, is that periodical payments in the nature of income only shall be apportionable.

JESSEL, M.R.:—

The question that I have really to decide is, what is the meaning of the last *Apportionment Act?* There seems to be some fatality about Apportionment Acts, for even this last one, though intended to settle all questions, is drawn in a very odd way. It begins thus: "Whereas rents and some other periodical payments are not at Common Law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising, divers statutes have been passed . . . . And whereas it is expedient to make provision for

(1) 1 Sim. (N.S.) 225.
(2) 4 Ves. 800.
(3) Cited 10 Ves. 189.
(4) 10 Ves. 185.
(5) 13 Price, 774.
(6) 7 Sim. 634.
(7) 1 H. L., Sc. 362.

the remedy of all such mischiefs and inconveniences." Therefore from the preamble one would think that the framer had in his mind only rents and other periodical payments, and that so appears from the title of the Act, "An Act for the better apportionment of rents and other periodical payments." But when we come to the body of the Act, nothing to my mind can be clearer than that it includes payments which are not periodical; and according to the rule in construing Acts of Parliament you need not have recourse to the preamble or the title in cases where the enacting portion of the Act is clear. Therefore, as in my opinion the enacting portion of this Act is clear, I shall disregard both the preamble and title and say that it does include, as it does in the plainest terms, payments not periodical.

The present question arises in this way. The second section of the Act is this: "From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

If the Act had stopped there it would agree with the preamble and title, because, though it has the word "dividends," it says "dividends and other periodical payments;" and it might well have been said that that meant dividends payable periodically. But we afterwards have a definition clause, and the definition clause as to dividends is this, "The word 'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise."

Now the word "bonus" alone points to an occasional payment as distinguished from a periodical payment. I do not think anybody ever heard of a periodical bonus, though very often bonuses are paid pretty regularly by some companies; but the words are really too clear for argument—"Whether such payments shall be usually made or declared at any fixed times or otherwise." Therefore it certainly includes the things so described, though they may not be periodical payments.

Then the only question is what the things themselves are. They are to be "all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies." I have then to consider what those words mean.

First of all, I think there is very little difficulty in dealing with the word "payments": that would include all payments. The subsequent words—"made by the name of dividend, bonus, or otherwise"—certainly cannot make them larger: but whatever they are called, so long as they are "payments," they are to be apportionable. Then they are to be out of "revenue." Here again there is very little difficulty about the word "revenue." It may be difficult to ascertain, as a fact, what is revenue, and what is not, and accountants may differ as to what the revenue of a particular company is—that is to say, how you ought to take the accounts distinguishing between capital and income. That is sometimes a very difficult question indeed, and one about which experts may differ, but there is no difficulty about the meaning of the word: the difficulty is in ascertaining what the fact is.

However, in this particular instance, I have not to consider any question except this, whether the revenue of a trading company includes its annual profits. To that question but one answer can be given—that it does: in fact annual profits are the proper revenue of a trading company. The real difficulty has arisen where it has been necessary to ascertain profits as distinguished from capital. Notwithstanding a very great deal of careful investigation into the subject in a large number of cases that have come before me, I find it quite impossible to come to an absolutely certain decision as to what is profit, and what is capital in the case of a trading company. That must depend, in very many instances, on the opinion of persons educated in the trade and on estimates—the deterioration of plant and so forth—before you can form any opinion at all, and one man's opinion will differ from another man's opinion on the subject, though they both possess all the information which it is possible to have both as regards the nature of the trade and the facts of the particular company. But still, if it is once ascertained that any particular receipts are annual profits, they are revenue or income; and in the case before me, undoubtedly, the bonus was paid and was, according to the terms of the deed of settlement, to be paid out of profits.

I now come to the next point, which is, what is this company? Is it "a trading or other public company"? In the absence of decision I should have thought it too clear for argument that the words "trading company" in the Act meant a public company. It cannot be meant to include a private partnership; indeed it has been expressly decided in *Jones* v. *Ogle* (1) that it does not include a private partnership, and therefore, of course, I should follow that decision even if my opinion were not that which it is: so that we have it that it must be a public company, whether it is a trading company or other company. Therefore it becomes immaterial to consider whether a particular company is or is not a trading company, and I am glad of it, because, though I think an insurance company might be called a trading company, many people might take the opposite view of the word "trade." I take the larger view, and think it would be called a trading company, but it is immaterial. If it is a public company at all, and not a trading company, it comes under the term "other public company."

The last words are, "public company." What does that mean? I decline to give a definition beyond this, that it is not a private partnership: that is quite settled. But what makes a public company—what *indicia* are sufficient to enable a Judge or jury to find that a certain company is a public company—it is not, in my opinion, either necessary or desirable to say. There is hardly a thing in nature or in art known by a common name of which it cannot be certainly predicated that it includes some particular element or substance which comes very nearly, if not altogether, within some other definition. I have no doubt, if you took the commonest of all common terms to define a particular article, you

(1) Law Rep. 8 Ch. 192.

would find that article contained some substance or other which would make it not very easy to say whether the common or well-known term applied or not.

Now that is the case with such a term as "public company." You may have a company on the border line, so to speak: it may be very difficult to say whether it is a public company or a private partnership: I desire not to give any definition. The case before me is a case of a very large insurance company. The *Star Life Insurance Company* was established in 1843, with a nominal capital of £100,000 divided into 4000 shares of £25 each, its management being regulated by a deed of settlement which provided as follows:—[His Lordship stated the purport of the deed, and continued:—] Then some years afterwards an Act of Parliament was obtained to enable the company to sue and be sued, because it was too large to sue without; and accordingly, in 1868, a special Act was passed containing various powers and provisions. [His Lordship stated them, and continued:—] As I said before, I give no definition, but sitting here as a Judge and jury, I come to the conclusion that the society is a public company within the meaning of the *Apportionment Act.* It is not a mere private partnership, but is something more—it is a public company.

Then that decides all the questions I have to decide, because the provisions of the deed of settlement are these, that there shall be a quinquennial division of profits; that out of the profits certain charges and what I will call an interim dividend of 5 per cent. shall be paid, and then one-tenth of the residue of such profits is to be divided among the shareholders. How? "Subject to the payment of such charges and the interest upon shares as aforesaid, the directors shall divide and appropriate one-tenth part of the surplus of such gains and profit amongst the shareholders of the society in a rateable proportion according to the number of shares held by each, and shall make known by circular addressed to each shareholder the amount of such profits apportioned to each shareholder;" such division of profits to be made at intervals of five years.

It is quite true there is a power for a general meeting to direct the division to be made in another year; but if that power is not exercised, it is to be at intervals of five years; and, as I read the Act of Parliament, it does not matter what the interval is; at all events, at this time it stood at five years and had not been altered.

Now, the testator died in the middle of the five years, so that part of the profits had accrued during his life and part after his death. He specifically bequeathed the shares. The legatee of the shares takes them subject to the Act of Parliament, which says this, that when the bonus or share of profit, or whatever you may choose to call it—" payment " is the term in the Act of Parliament—when that payment is made, although in fact it may have accrued to a greater extent during the last two years than the previous three years, or *vice versâ*, it shall be treated like interest on money and be considered as accruing from day to day. Therefore, when you get this bonus or payment declared, you are to treat it as interest on money from day to day.

It does appear to me that I have only to apply the words of the enacting part of the Act as I find them. I am not to speculate as to whether it was intended to be income on which the testator could count or not—he happened to be a director, and therefore, I dare say, knew pretty well what the profits would be; but I think that is utterly immaterial. The only point is, is it within the plain words of the Act of Parliament? I think it is, and therefore I decide that the quinquennial bonus or division of profits is apportionable. The apportionment will take place as from the 31st of December, 1873.

Solicitors: *Sutcliffe & Summers; Bridges, Sawtell, & Co.*

M. R.
1879
July 25

HENTY *v.* SCHRÖDER.

[1877 H. 345.]

Vendor and Purchaser—Specific Performance—Decree against Purchaser in Default—Order to rescind Agreement—Claim for Damages—Form of Order.

After a decree for specific performance of an agreement against a purchaser who was unable to complete,—on a motion by the Plaintiffs that the agreement might be rescinded, and all further proceedings in the action stayed except as to any application which might be made to the Court to award and assess the damages which the Plaintiffs had sustained by the breach of the agreement:—

Held, that the Plaintiffs were only entitled to have the agreement rescinded, and could not at the same time claim damages for its breach.

The form of order in *Foligno* v. *Martin* (1), *Sweet* v. *Meredith* (2), and *Watson* v. *Cox* (3), not followed.

THIS action was brought by the Plaintiffs, who were vendors, to enforce specific performance of an agreement entered into by the Defendant for the purchase of an estate.

The Defendant made default in delivering a defence, and, on motion for judgment, the usual decree was made against him.

In June, 1879, the Chief Clerk made his certificate as to the amount due from the Defendant in respect of the purchase-money and interest. The conveyance was thereupon tendered to the Defendant, who refused to execute it.

The Plaintiffs now moved that the agreement might be rescinded, and that all further proceedings in the action might be stayed except as to any application which might be made to the Court to award and assess the damages which the Plaintiffs had sustained by reason or in consequence of the breach by the Defendant of the said agreement.

There was an affidavit by the Plaintiffs' solicitors that they believed that the Defendant was unable and was not likely to be able to pay the purchase-money.

Chitty, Q.C., and *B. B. Swan*, in support of the motion, referred

(1) 16 Beav. 586.
(2) 4 Giff. 207.
(3) Law Rep. 15 Eq. 219.

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to *Foligno* v. *Martin* (1), *Sweet* v. *Meredith* (2), and *Watson* v. *Cox* (3), where a similar order had been made; also to the form in *Seton* (4).

The Defendant did not appear.

JESSEL, M.R., considered that the Plaintiffs could not at the same time obtain an order to have the agreement rescinded and claim damages against the Defendant for the breach of the agreement. His Lordship declined to make an order in the form in *Foligno* v. *Martin, Sweet* v. *Meredith,* and *Watson* v. *Cox,* and only ordered that the agreement should be rescinded; that all other proceedings in the action should be stayed; and that the Defendant should pay the Plaintiffs' costs.

Solicitor: *A. S. Edmunds,* agent for *R. Edmunds, Worthing.*

In re PINÈDE'S SETTLEMENT.

M. R.
1879
July 26.

Power of Appointment—Exercise of Power by Will—Residuary Gift—Wills Act (1 *Vict. c.* 26), *s.* 27.

Under a settlement two sums of stock were vested in *A.*, *B.*, and *C.*, as trustees, upon trust as testatrix, a married woman, should by will appoint, and in default of appointment upon other trusts. Testatrix, in exercise of that power, appointed that *A.*, *B.*, and *C.* should stand possessed of the said two sums in trust to pay a legacy of £2000 (which lapsed) and other legacies amounting to £6100. She bequeathed to her husband £2000, which she authorized her executors to pay, and bequeathed to him her *H.* stock not included in the settlement. She directed that her funeral expenses be paid by her said trustees out of her said trust property, and that her legacies be paid free of duty. And as to all the residue of her personal estate whatsoever she bequeathed the same to her nephew, who died in her lifetime. She appointed *A.*, *B.*, and *D.* her executors.

At the date of the will the value of the trust property was about £11,000, and she had no other property except the *H.* stock and some small savings of her separate estate:—

Held, that the trust property was intended by the testatrix to be taken

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(1) 16 Beav. 586.

(2) 4 Giff. 207.

(3) Law Rep. 15 Eq. 219.

(4) 4th Ed. Vol. ii. p. 1329.

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out of the settlement for all purposes, and that, having regard to sect. 27 of the *Wills Act*, the balance, after payment of all the legacies, duty, and expenses, became part of her personal estate and passed to her husband.

16 Ch D 216,
29
17 Ch D 154
/155,
22 Ch D 239
240
23 Ch. D 219

PETITION.

This was a petition by *Abraham Alphonse Pinède* for the payment out of Court of the sum of £2491 8s., which he claimed to be entitled to as the legal personal representative of his wife, *Elizabeth Pinède*, under the following circumstances:—

By a settlement dated the 8th of July, 1856, and made on the marriage of the Petitioner and his said wife the sum of £4000 *East India* Stock, and the sum of £3200 Consols belonging to the said *Elizabeth Pinède*, and which had been transferred to *E. M. Hore*, *John Sargeaunt*, and *R. Browning*, as trustees, were settled upon trust (in the events which happened) for *Elizabeth Pinède* for her life, and after her decease and in default of children (which was the case), upon such trusts and for such person or persons as the said *Elizabeth Pinède* notwithstanding coverture should by will appoint, and in default of such appointment, and so far as no such appointment should extend, in trust for *John Biggers* and *Sarah Sargeaunt* in equal shares as tenants in common.

Sarah Sargeaunt died in February, 1857.

On the 2nd of December, 1857, *Elizabeth Pinède* made her will, and thereby, after reciting that by the said settlement the said *E. M. Hore*, *J. Sargeaunt*, and *R. Browning* were to stand possessed of the sum of £4000 *East India* Stock and of a sum of £3200 Consols upon the trusts therein mentioned, she, in execution of the power so reserved to her, directed and appointed that the said *E. M. Hore*, *John Sargeaunt*, and *R. Browning* should stand possessed of the said trust moneys, stocks, funds, and securities after her decease, if there should have been no child of the marriage (which was the case), upon trust to pay to her nephew *John Biggers* £2000, and nine legacies of £500 each, and six legacies of £100 each. The will continued thus: "Whereas my husband *Abraham Alphonse Pinède* having already received from me on our marriage the sum of £5000 Consols, I give and bequeath to him the further sum of £2000 sterling; but in case I should pay the same during my life this legacy is to be void. And I hereby authorize my executors to pay to my said husband the said sum of £2000 unless I deliver to them in my lifetime a receipt for the same signed by my husband or give them notice in writing of having given the same to my said husband. I also give to my said husband all my stock in the *West Hartlepool Harbour and Railway Company.* And I direct that my funeral expenses and the expenses of proving this my will be paid by my said trustees out of my said trust property. And I also direct that my said legacies so given and bequeathed by me be paid free of legacy duty. And as to all the residue of my personal estate whatsoever, I bequeath the same to my said nephew the said *John Biggers.* I appoint the said *E. M. Hore*, the said *John Sargeaunt*, and my said cousin *John Barnaby Sargeaunt* executors of this my will."

The *West Hartlepool Harbour and Railway* Stock mentioned in the will was not included in the settlement, but belonged to the testatrix for her separate use, with a power to dispose thereof as she thought fit.

At the date of the will the whole of the property over which the testatrix had any disposing power, besides the *West Hartlepool* Stock, was that comprised in the settlement, and a small amount of savings from her separate estate.

In 1858 *John Sargeaunt* died, and *John Barnaby Sargeaunt* was appointed trustee in his place.

In 1866, in pursuance of a power in the settlement, the testatrix withdrew from the trusts thereof £500 Consols, part of the sum of £3200 Consols which was sold, and the proceeds paid to the account of the testatrix at her bankers.

In 1874 the £4000 *East India* Stock was paid off, and a sum of £8800 Reduced Annuities was accepted by the trustees of the settlement in its place.

In March, 1876, *John Biggers* died, and letters of administration to his estate were granted to his widow.

On the 17th of October, 1876, the testatrix made a codicil revoking two of the legacies of £500 given by her will, and giving one legacy of £400 and another of £200, and in all other respects confirming her will.

On the 23rd of October, 1877, the testatrix died. At the time of her death she was possessed in her own right of the *West*

Hartlepool Harbour and Railway Stock (now *North Eastern Railway* Stock) and of Russian Stock of the nominal value of £1000, purchased by her with the savings of her separate estate and of other property to a small amount in value. Probate of her will and codicil was granted to her surviving executors, limited to the administration of such personal estate as under the settlement she had a right to dispose of, and letters of administration of the rest of her personal estate were granted to her husband, the Petitioner.

The said *E. M. Hore, J. B. Sargeaunt*, and *R. Browning*, the trustees of the settlement, had sold the funds comprised in the settlement and realized £10,953 15*s.*, and applied £8429 7*s.* 4*d.*, part thereof, for the purpose of the payment of the legacies given by the will and codicil, including the legacy of £2000 to the Petitioner, but not the sum of £2000 bequeathed to *John Biggers*, which had lapsed by his death in the lifetime of *Elizabeth Pinède*. The balance had been paid into Court under the *Trustees Relief Act*, and the Petitioner now prayed that the same might be paid to him. The question raised by the petition was whether this fund passed under the residuary gift in the will as part of the personal estate of the testatrix, in which case, the gift to *John Biggers* having lapsed, the Petitioner, as his wife's personal representative, would be entitled to it; or whether it passed in default of appointment to the personal representatives of *John Biggers* and *Sarah Sargeaunt*.

Davey, Q.C., and *Cecil Russell*, for the Petitioner:—

The will of *Elizabeth Pinède*, the donee of the power, operated as a complete appointment of the settled fund, and the amount remaining after payment of the legacies passed under the residuary gift to the exclusion of those who were entitled in default of appointment. Where there is a clear intention shewn by a will made in exercise of a general power of appointment to treat the settled property as part of the personal estate, then it passes under the will, and the trust in default of appointment does not take effect: *Chamberlain* v. *Hutchinson* (1).

In this case the testatrix appointed executors of her will who were not identical with the trustees of her settlement, and this

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(1) 22 Beav. 444.

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appointment indicates an intention that the trust fund was to be taken out of the settlement and to become part of her general personal estate: *Brickenden* v. *Williams* (1); *Wilkinson* v. *Schneider* (2); *Attorney-General* v. *Brackenbury* (3).

Here the testatrix speaks of "all the residue of my personal estate," shewing that she includes both the settled property and the rest which she had power to dispose of as one aggregate fund. There are, no doubt, cases which might be cited the other way, as, for instance, *In re Davies' Trusts* (4); but we submit that the general current of authority is in favour of the contention that the fund in question passed under the residuary gift, and, that gift having lapsed, the Petitioner is entitled. Among the more recent cases there is one Irish decision in which the principle we contend for is very clearly laid down: *In re De Lusi's Trusts* (5).

Waller, Q.C., and *Dumergue*, for the widow and personal representative of *John Biggers*:—

We contend that the fund in Court goes to the persons entitled under the settlement in default of appointment. There is not in this case sufficient indication of intention on the part of the testatrix to take any part of the trust fund out of the settlement. It is to be observed that there is a distinction in the will between what the testatrix describes as "my trust property" out of which the legacy duty is to be paid and "all the residue of my personal estate." This being so, we submit that so much of the settled property as remains after payment of the legacies and legacy duty cannot be taken to have passed under the residuary gift. The result is that the trust in default of appointment took effect, and the personal representative of *John Biggers* is entitled to one moiety of the fund: *Hoare* v. *Osborne* (6).

Chitty, Q.C., and *Langley*, for the personal representative of Mrs. *Sergeaunt*:—

The power of appointment is exhausted by the appointment of the settled property by the will before you come to the residuary

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(1) Law Rep. 7 Eq. 310.
(2) Ibid. 9 Eq. 423.
(3) 1 H. & C. 782. 9 Jur. N.S. 257
(4) Law Rep. 13 Eq. 163.
(5) 3 Ir. L. Rep. 232.
(6) 33 L. J. (Ch.) 586. 10 Jur. N.S. 674

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gift. The language is insufficient to pass this fund, having regard to sect. 27 of the *Wills Act*.

JESSEL, M.R. :—

The question really is one of intention; did the testatrix intend to dispose of this property as part of her personal estate, including in that disposition the effect of the *Wills Act* as regards the doctrine of lapse, that is, did she intend to dispose of it entirely so as to take it out of the instrument creating the power?

15 Ch D 26

[illegible]

I do not know that the case can be better stated than in the way in which it is stated by Vice-Chancellor *Chatterton* in *In re De Lusi's Trusts* (1), to which I have been referred: "The question in all cases of the class now before me is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed."

I will only refer to one other case of those cited before me, that of *Brickenden* v. *Williams* (2), before Vice-Chancellor *James*, in which he says: "Upon this particular instrument I think the testatrix did intend to make the fund part of her general estate; because she not only gives it to the executors, which is, I think, almost conclusive on that point, but having given it to the executors she proceeds afterwards to speak of it as 'my property.'" Then he goes on: "Treating everything over which she had any power of testamentary appointment, and which would have included any savings of her separate estate, as one mass." That, I think, shews what, in his opinion, would be a manifestation of the intention, and I intend to follow that case, because I think the reasoning of it is good sense as a guide to shew what the testatrix meant.

Does this testatrix treat this property as her own, to be dealt with as one mass with the savings of her separate estate, and to be disposed of accordingly? Let us see what she does. She begins by reciting the settlement with the names of three trustees, two of whom only she makes executors with another person, and she tells

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(1) 3 Ir. L. Rep. 232, 237.

(2) Law Rep. 7 Eq. 310, 316.

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us that the settlement consists of £4000 *East India* Stock and a sum of £3200 £3 per Cent. Consols.

Now at this date that fund was worth upwards of £11,000. She then directs the said trustees of the settlement, in case there is no issue of the marriage (which is the case in which the power was exerciseable), to pay legacies amounting to £8100, including the legacy of £2000 to her nephew *John Biggers;* and then she goes on in this way, which is very remarkable: "Whereas my said husband *Abraham Alphonse Pinède* having already received from me on our marriage the sum of £5000 Consolidated Bank Annuities, I give and bequeath to him the further sum of £2000 sterling." Then she says that in case she pays him in her lifetime, he is not to have it. Then she gives him some stock in the *West Hartlepool Harbour and Railway Company*, which belonged to her for her separate use, not being in the settlement; and she adds, "And I direct that the funeral expenses and the expenses of proving this my will be paid by my trustees" (which I suppose refers to her executors before mentioned, or it may refer to the trustees of the settlement) "out of my said trust property. And I also direct that all my said legacies so given and bequeathed by me be paid free of legacy duty. And as to all the residue of my personal estate whatsoever, I bequeath the same to my said nephew the said *John Biggers*." Then she appoints two of the three trustees and her cousin *John Barnaby Sargeaunt* to be her executors. This will was made by the lady soon after her marriage, when she had no property whatever except the property comprised in the settlement, the particular *West Hartlepool* stock specifically bequeathed, and any small savings which she might have made, or could in future make, from her income under the settlement.

That being so, how was the £2000 to be paid to the husband? She only directs her executors to pay it. How? It could not have been paid except out of the settlement property. There is nothing to pay it with. One must recollect that it is a married woman in this case, and we know what her property was. It is obvious when she gives that legacy of £2000 that it is intended to be paid out of the trust fund. Then she gives the residue "of my personal estate." What does that mean? By law it would include, no doubt, any savings that she might make (I do not suppose she had made any then) out of her separate estate, and would include a great deal more; it would include the residue of the trust fund, because, having a general power of appointment, "the residue of my personal estate" includes that which is subject to the general power.

Here she gives the residue, as Vice-Chancellor *James* said, "in one mass," and it was a residue which she must have known to exist, for even when you add the £2000 legacy to the £8100 you do not exhaust the trust fund; there is still something over, not a great deal, because she has directed the legacy duty to be paid. So that it is plain that, whether we have regard to the words of the *Wills Act*, or whether we have regard to the general intention of mankind, which was the reason of the *Wills Act*, she has included in the gift of residue the remainder of the trust fund and any savings which she might possess, and has described it as "all the residue of my personal estate whatsoever."

Besides, we find that she has directed that "my funeral expenses, and the expenses of proving this my will, be paid by my said trustees out of my said trust property." She has made the trust property hers, she calls it "my said trust property," and she directs such things as funeral expenses and the expenses of proving her will to be paid out of it.

We have, therefore, in addition to the appointment of executors, the fact that the testatrix has treated the fund as hers, and has made it hers so far as she can make it hers. She can make it hers for the purpose of distribution after her death; that is, she can make it her property in the sense that it shall devolve in the same way as property simply settled to her separate use would devolve.

It appears to me that this will does evince an intention on the part of the testatrix to treat the whole of the property as hers, and to make it her own; and, though the residuary legatee does not take, because he died in the lifetime of the testatrix, yet that the property is to be dealt with as the testatrix's own property, and consequently that the husband is entitled.

Solicitors: *Hores & Pattisson; H. T. Boodle.*

LEMPRIÈRE *v.* LANGE.

[1879 L. 89.]

M. R.
1879
July 26.

Infant, Lease to—Misrepresentation as to Age—Use and Occupation—Injunction.

18 Ch. D 117

In an action against an infant who had obtained a lease of a furnished house on an implied representation that he was of full age:—

Held, that the lease must be declared void, and possession given up, and that the Defendant should be restrained by injunction from parting with the furniture; but that he was not liable for use and occupation.

THE Plaintiff, *R. R. Lemprière*, was the lessee and occupier of a dwelling-house at 8, *Melina Place*. In February, 1879, he put up a notice that the premises were to let and the furniture to be sold.

The Defendant applied to the Plaintiff to take the house and purchase the furniture, representing himself as a responsible man in good position, and well able to assume and discharge the obligations of a lessee, and also giving the names of four persons as referees.

The Plaintiff, in reliance upon the Defendant's representations, agreed to let the premises and to sell the furniture to him upon the terms of the following agreement, which was signed by the Defendant on the 23rd of February, 1879:—

"I hereby agree to take the premises, 8 *Melina Place*, of *R. R. Lemprière*, Esq., on a lease of 7, 14, 21 years, at a rent of £4 per week, to be paid monthly, and, on payment by me at any time of the sum of £400 to the said *R. R. Lemprière*, the furniture and effects in the said premises to become my property.

"This memorandum is subject to the approval of my references by *R. R. Lemprière*."

The Plaintiff had a personal interview with the Defendant's solicitor, who informed him that the Defendant was possessed of ample means, and that he had been married about ten months to a lady whose income from her father was £20 per week. The Plaintiff was also informed by another of the referees that the Defendant would be a very desirable tenant, and the Plaintiff's solicitors obtained an official copy of the certificate of the Defendant's marriage, in which he was described as being of age.

The Plaintiff, in reliance upon these representations and statements, and being satisfied with the results of the inquiries, directed a lease to be prepared on the terms of the memorandum, which was dated the 8th of March, 1879, and was executed by the Plaintiff and Defendant. The lease contained the usual lessee's covenants. The Plaintiff thereupon gave possession of the premises, with all the furniture and effects therein, to the Defendant

Soon afterwards the Plaintiff for the first time ascertained that the Defendant was at the date of the lease an infant under the age of twenty-one years; he thereupon brought the present action, alleging by his statement of claim the above facts, and that the Defendant was still an infant; that the Defendant claimed the right to hold the lease and the term thereby granted, and the furniture and effects, but denied his liability for any of the covenants on his part in the lease, and threatened to remove the furniture and effects. The Plaintiff further alleged that the lease was obtained from him by the Defendant fraudulently and by misrepresentations, and that the Defendant was still in possession of the premises and of the furniture and effects.

The Plaintiff claimed that the lease might be cancelled and set aside; that the Defendant might be ordered to give up possession to the Plaintiff of the premises and of the furniture and effects; that he might be ordered to pay to the Plaintiff mesne profits; that he might be restrained by injunction from selling or parting with any of the furniture and effects; that a receiver might be appointed, and that the Defendant might be ordered to pay damages for the user and detention of the furniture and effects.

An appearance was entered on behalf of the infant, and the official solicitor was assigned as his guardian.

Chitty, Q.C., and *Cozens-Hardy*, for the Plaintiff:—

The Defendant having obtained the lease of the Plaintiff's house by representing himself as a responsible person and capable of contracting, has rendered himself liable to the Plaintiff on the ground of fraud and misrepresentation. There was on his part an implied representation that he was of full age: he was so described in his marriage certificate, of which the Plaintiff's solicitors had obtained an official copy; and, apart from that, he must be taken from his conduct to have represented himself as of full age. We submit that the Plaintiff is entitled to have the lease set aside, and also that the Defendant is liable to pay mesne profits, to be restrained by injunction from continuing in possession, and to pay damages for use and occupation.

An infant cannot take advantage of his own fraud, and will be held liable in equity for it: *Wright* v. *Snowe* (1); *Cory* v. *Gertcken* (2); *Bristow* v. *Eastman* (3); *Chubb* v. *Griffiths* (4); *Stikeman* v. *Dawson* (5); *Drury* v. *Drury* (6); *Esron* v. *Nicholas* (7); *Lowe* v. *Griffith* (8); *In re King* (9).

In *Earl of Buckinghamshire* v. *Drury* (10) there is a *dictum* of Lord *Mansfield* to the effect that infancy could never authorize the committing of a fraud, and that, if an infant took an estate and was to pay rent for it, he should not hold the estate and defend himself against payment of the rent, by reason of infancy.

[JESSEL, M.R.:—That is not the law.]

The question can be traced back as far as the Year Books. Thus, in 21 Hen. 6, 31 B, it was held by Mr. Justice *Newton* that if an infant lessee took possession, he was bound to pay the rent.

In *Kirton* v. *Eliott* (11), where a lease had been granted to an infant rendering rent and an action was brought for the rent behind, Mr. Justice *Haughton* observed, "If a lease be made of an acre of land to an infant, rendering a £100 rent by the year, and he doth occupy and enjoy this, he shall be charged with the rent, he being here to be taken as a purchaser." Mr. Justice *Dodderidge* observed: "If a greater rent be reserved than the land is worth, there, peradventure, the infant shall not be charged with it." In the principal case the Court were all clearly of opinion that the infant lessee was liable to pay the rent, and the action was well brought; and so judgment was given for the Plaintiff. The subject is also referred to in *Rolle's* Abridgment, "Enfants," K. (1), where this case is cited under the name of "*Keetle* v. *Eliot*"; it there appears that the Defendant's liability arose from his continuance in the occupation of the premises after he came of age. The same case is also reported by the name of *Ketsey's Case* (2): "The Defendant in bar pleaded infancy at the time of the lease made, whereupon the Plaintiff demurred. The sole question was, whether a lease made to an infant is void? and it was objected that it should be void, because it might be prejudicial to him, who had not sufficient discretion for the managing of the land; and the rent may be greater than the value of the land. But the Court held it to be voidable only at his election; for if it were for his benefit, it shall be no ways void; but the infant at his election may make it void, by refusing and waiving the land before the rent-day comes; for then no action of debt will lie against him. But in the principal case it was not shewed that the rent was of greater value, and the Defendant was of full age before the rent-day came: therefore it was adjudged for the Plaintiff."

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(1) 2 De G. & Sm. 321.

(2) 2 Madd. 40.

(3) 1 Esp. 172.

(4) 35 Beav. 127.

(5) 1 De G. & Sm. 90.

(6) 2 Eden, 60.

(7) 1 De G. & Sm. 118.

(8) 1 Scott, 458.

(9) 3 De G. & J. 63.

(10) 2 Eden, 61, 72.

(11) 2 Buls. 69; 1 Brownlow, 120.

In *Evelyn* v. *Chichester* (3) it was held that the lord of a manor might maintain an action for the fine due upon the admittance of an infant, and Mr. Justice *Yates* observed (4): "If the Defendant was still an infant, I should think this action maintainable. Debt, perhaps, would not lie; because an infant cannot wage his law. But *assumpsit*, I think, would lie; as the infant continued to occupy and enjoy the estate."

The case of *Crisp* v. *Churchill* (E. 34 Geo. 3), *Coram Eyre*, C.J., is thus cited in *Lloyd* v. *Johnson* (5): "Where in an action for use and occupation of a lodging, it being set up that the Defendant was an infant and a prostitute, the Chief Justice was of opinion that those circumstances were no bar to the action, as both an infant and a prostitute must have a lodging: but it being shewn that the lodging was let to the Defendant for purposes of prostitution and with a knowledge on the part of the Plaintiff of that fact, he held that the action was not maintain-

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(1) Page 731.

(2) Cro. Jac. 320.

(3) 3 Burr. 1717.

(4) Ibid. 1719.

(5) 1 B. & P. 340.

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able." More recently the same principle was recognised in *North Western Railway Company* v. *McMichael* (1).

The Defendant did not appear.

JESSEL, M.R.:—

The Plaintiff cannot at the same time claim to have the lease declared void, and to make the Defendant liable for use and occupation. The lease will be declared to be void and ordered to be delivered up to be cancelled, and possession of the house must be given to the Plaintiff; and there will be an injunction to restrain the Defendant from selling or parting with any of the furniture and effects; the Defendant must pay the costs of the action.

Solicitors for Plaintiff: *Todd & Dennes.*

M. R.
1879
May 17, 24, 30.

In re BOLTON BENEFIT LOAN SOCIETY.

COOP *v.* BOOTH.

[1879 C. 215.]

Winding-up—Companies Act, 1862, ss. 199, 200—*Unregistered Loan Society under* 3 & 4 *Vict. c.* 110, *with less than Seven Members—Action for Dissolution of Partnership—Order for Dissolution and Winding-up.*

On a creditor's petition for the winding-up of an unregistered loan society, formed under 3 & 4 Vict. c. 110, the members of which formerly exceeded seven in number but were now only four:—

Held, that, having regard to sects. 199 and 200 of the *Companies Act*, 1862, a winding-up order could not be made when the number of members had at the date of the petition fallen below seven.

IN this case a creditor's petition was presented for winding up a society formed in 1854 under the *Loan Societies Act*, 3 & 4 Vict. c. 110.

It appeared that the number of the members had fluctuated, it having sometimes exceeded and sometimes been less than seven at one time. The rules contained no power to withdraw from membership, and the share certificates were marked "not transferable." There were now only four members acting and recognised as such; but six others were living who had withdrawn their money and ceased to act as members, and others had died. The society admitted its insolvency. A provisional liquidator had been appointed in Chambers.

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(1) 5 Ex. 114.

Chitty, Q.C., and *Decimus Sturges*, for the Petitioner:—

The society must be taken to consist of more than seven members so as to be capable of being wound up under the *Companies Act*, 1862, ss. 199, 200, there being six living persons who are or may be liable as members, besides the four present members and besides the estates of the deceased members, for the debts of the society or for the expenses of winding up. The exemption of past members contained in sect. 38 of the *Companies Act*, 1862, is not extended by sect. 200 to unregistered societies. The society was never a partnership, or so intended to be. It was capable of being wound up until its numbers dropped to seven and under; and it is not a necessary construction of the Act that such capability was then lost. The number of members for the purposes of winding up is the number of members or estates liable to contribute.

Russell Roberts, for the society, desired a winding-up order, as less onerous to the members than the bankruptcies or dissolutions of the successive partnerships.

Jessel, M.R., thought that, unless there were seven members at the date when the petition was presented, no winding-up order could be made. The petition had better stand over for an action to be commenced, on which a decree for dissolution might be made, as in case of a partnership.

May 30. The action *Coop* v. *Booth* having been commenced as a partnership action by one of the four members against the other three, now came on with the petition, when an order was made for the dissolution of the society and the winding-up of its affairs, and, at the request of creditors, for an additional person to act as receiver or liquidator.

Solicitors: *Hamlin & Grammer.*

In re ORRELL COLLIERY AND FIRE-BRICK COMPANY.

M. R.
1879
June 21.

Company—Winding-up Order pending Action against Company—Order to dismiss for want of Prosecution—Subsequent Claim by Plaintiff.

Where an action had been commenced against a company and continued by leave after a winding-up order, and before trial an order had been obtained to dismiss the action for want of prosecution:—

Held, that the Plaintiff in the action was not debarred from bringing forward a claim in the same matter in the winding-up.

AN action had been commenced in April, 1876, by *J. Holt* against the *Orrell Colliery and Fire-Brick Company* and other parties, and, pending the action, the company passed a resolution to wind up the company voluntarily. In June, 1876, an order was made to continue the voluntary winding-up under supervision.

In July, 1876, the Plaintiff in the action obtained leave to continue his action, as against the company, notwithstanding the winding-up, and the company subsequently delivered a statement of defence. The Plaintiff not having delivered a reply or given notice of trial, the company obtained an order dismissing the action for want of prosecution.

The Plaintiff in the action now took out a summons in the winding-up, to establish a claim against the company in respect of the matter as to which his action related.

Davey, Q.C., and *Buckley*, in support of the claim.

Ince, Q.C., and *Clare*, for the company, raised a preliminary objection:—

The claim is barred by reason of the order dismissing the action for want of prosecution. By Rules of Court, 1875, Order XLI., rule 6, it is provided that "any judgment of nonsuit, unless the Court or Judge otherwise directs, shall have the same effect as a judgment upon the merits for the Defendant." This quite alters the former practice, under which it was competent, after a nonsuit, to commence another action in the same matter. The power now given to the Court to order an action to be dismissed for want of

SC on appl. WN(79) 107 MR

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prosecution on the application of the Defendant must have been intended to put a complete stop to the Plaintiff's claim.

Davey, Q.C., and *Buckley*, *contrà*:—

We submit that the dismissal of an action for want of prosecution corresponds to the judgment of *non pros.* in the old practice at Common Law, which was a final judgment against the Plaintiff for costs only. After that judgment a Plaintiff might commence a new action against the Defendant for the same cause: *Archbold's* Practice (1); *Turton* v. *Hayes* (2); *Nesbit* v. *Rishton* (3). The case is quite unaffected by the new Rules of Court, and therefore, having regard to the former practice, there is nothing to prevent the Plaintiff in the action from seeking to establish his claim.

Ince, in reply.

JESSEL, M.R.:—

It is very much to be desired that a new rule should be made to meet cases of this kind. But in the meantime the former practice applies except so far as it has been altered by the *Judicature Act* and the Rules of Court, and I find nothing in them which varies it on this point.

Formerly a man could abandon his action by not taking any further steps in it, whether it were brought at Common Law or in Chancery. In the former case the Defendant signed judgment of *non pros.*, which exactly described what had happened; in the latter case he would have the bill dismissed for want of prosecution, but in either case the Plaintiff could bring a new action for the same matter, with this exception only, that in Chancery, if the cause had been set down to be heard, the dismissal of the bill for want of prosecution was equivalent to dismissal on the merits, and was a bar to a new action.

In this case, if the action had been set down for hearing, there might have been a question whether the former rule of Common Law or that of the Court of Chancery ought to prevail. But in a case where, as here, the action had not been set down, there was only one rule, namely, that a fresh action might be brought. If the new Rules had been intended to make an alteration in this respect, it would have been so expressed. But that has not been done, and consequently the practice is the same as it was before the Rules were made. I am therefore of opinion that the applicant is entitled to proceed with his summons.

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(1) 12th Ed. p. 1482.

(2) 1 Str. 439.

(3) 11 A. & E. 244.

Solicitors for Applicant: *Field, Roscoe, & Co.*, agents for *F. D. Lowndes, Liverpool.*

Solicitors for Company: *Gregory & Co.*, agents for *A. S. Mather, Liverpool.*

TAPLEY *v.* EAGLETON.

[1878 K. 106.]

M. R.
1879
Aug. 2.

Will—Specific Bequest—Gift of "Two Houses in King Street" by Owner of Three Houses—Election.

Testator, who was possessed of three leasehold houses in *K. Street*, bequeathed "two houses in *K. Street*" in trust for *P.* for life, and then to form part of his residuary gift. The will contained no other references to the testator's houses in *K. Street*:—

Held, that two of the houses passed under the gift, and that *P.* was entitled to elect which he would take.

THE will of *Thomas Knight*, dated the 27th of October, 1877, contained the following gift:—

"I give, devise, and bequeath unto my trustees all those my leasehold houses, situate in *Middle Street, Hindle Street*, and *John Street*, with *Brown's Place, Shacklewell*, and Nos. 13, 14, and 15, *Bay Street*, and *Belgrave Cottage*, in the rear of *Holly Street, Dalston*, two houses in *King Street, Kingsland Road*, and four houses in *Thomas Street, Millwall*, and Nos. 13, 14, 15, and 16, *Northbrook Villas, Lee*, upon trust, after payment of the rents, to pay the rents and profits of the said premises to *Enos Purcell* during his life, and after his death the said premises shall form part of my residuary estate."

The testator gave his residuary estate to his trustees in trust for the Plaintiff for her life, with remainder in trust for her children as therein mentioned. The will contained no other reference to the testator's houses in *King Street.*

The question arose on further consideration of an action for the adminstration of the testator's estate, as to the effect of the gift of the testator's "two houses in *King Street,*" as he had three leasehold houses in *King Street,* which were held by him under one lease, and two of which were comprised in one underlease and the third in a separate underlease.

Maidlow (*Roxburgh,* Q.C., with him), for the residuary legatees, submitted that two only of the houses passed, and that it was a case for election. Otherwise the gift would be void for uncertainty. He referred to *Sheppard's* Touchstone (1); *Co. Litt.* (2); *Jacques* v. *Chambers* (3); *Theobald* on Wills (4); *Richardson* v. *Watson* (5); *Mervyn* v. *Lyds* (6).

S. Stephens, for the equitable tenant for life under the gift, submitted that under the gift in the will all the three houses in *King Street* passed. This was clear from the wording of the clause, which shewed that the testator meant to give all his houses in each locality. Moreover, it appeared that two of the three houses were comprised in one underlease. He referred to *Sampson* v. *Sampson* (7).

Ince, Q.C., and *Whitaker,* for the trustees.

Maidlow, in reply.

JESSEL, M.R. :—

I am of opinion that under this gift two of the testator's houses in *King Street* pass to the legatee, who is entitled to elect which of the two he will take. If the testator had said "two of my houses in *King Street,*" the result would have been the same.

In *Sheppard's* Touchstone, where I find no such distinction laid down as in *Richardson* v. *Watson,* the law is thus stated: (8) "If one grant to me a rent or a robe; twenty shillings or forty shillings; or common of pasture or rent; in the disjunctive, which is at the first very incertain; yet this grant may become good; for if I make my election, or he pay the rent, or perform the grant in either part, the grant is now become good. So if one be seised of two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to *I. S.*; in this case if *I. S.* make his election which acre he will have, the grant of the remainder to him will be good."

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(1) Page 251.
(2) 145 a.
(3) 2 Coll. 435.
(4) Page 25.
(5) 4 B. & Ad. 787.
(6) Dyer, 90 a.
(7) Law Rep. 8 Eq. 479.
(8) Page 251, 7th Ed. 1821.

To the same effect is the most recent case on the subject, *Duckmanton* v. *Duckmanton* (1). There the testator, being seised of two closes in *Ridgway Field*, devised to his son *John* one close in *Ridgway Field*, and to his son *George* one close in *Ridgway Field*. If there had been only one close the two sons would have taken it between them, and yet the Court held that the devise to *John* was not void for uncertainty, and that the case was one for election. In that case Chief Baron *Pollock* observed (2): "It was admitted that, if he had devised one to *John* and said nothing as to the other, the devise would have been good. So if he had devised one to *George*, it would in a like manner have been a good devise. But he devised one to each, and it is said that the devise must therefore mean nothing. I cannot understand that." That case is not distinguishable from the present.

The declaration will be that the legatee electing which two of the three houses he will take, he will be entitled to the same accordingly for his life.

Solicitors: *O. C. T. Eagleton*; *Clutton & Haynes*.

(1) 5 H. & N. 219.

(2) 5 H. & N. 222.

M. R.
1879
April 29.

POWELL *v.* HEAD.

[1878 P. 18.]

Dramatic Copyright—License by one Part Owner—Action by other Part Owners against Licensee—Penalty—3 Will. 4, c. 15, s. 2—5 & 6 Vict. c. 45.

The part owner of a dramatic entertainment cannot grant a license for its representation without the consent of all the other owners.

Accordingly, where the registered owner of the undivided moiety of the copyright of an opera had alone granted a license for its representation, on an action by the other owners of the other moiety to recover the penalty under 3 Will. 4, c. 15, s. 2:—

Held, that, having regard to that Act and the Act 4 & 5 Vict. c. 45, the icense was illegally granted, and that the Defendant was liable to pay to the Plaintiffs one half of the penalty of 40*s*. for each representation.

THE Plantiffs, Mr. and Mrs. *Powell*, were the owners, under an assignment to Mrs. *Powell*, of an undivided moiety of the copyright and right of representation and performance of a dramatic entertainment or opera. The other undivided moiety belonged at the time of the license hereafter mentioned to Mrs. *Liston*, now deceased.

The Plaintiffs had made the entry in the registry book of the *Stationers' Company* of the title of the opera and of the other particulars required by the Act 5 & 6 Vict. c. 45. The statement of claim alleged that the Defendant had, without the Plaintiffs' leave or license, represented the opera for fifty-five nights. They claimed damages under the Act 3 Will. 4, c. 15, s. 2, and also an injunction to restrain the Defendant from performing or representing the opera, and from infringing the Plaintiffs' copyright and right of representation.

The Defendant admitted his representation of the opera, but stated that he had the license of Mrs. *Liston*, who being at the time when such license was given the registered owner of the other undivided moiety of the opera, was, as he contended, entitled to grant the license. The Defendant alleged that Mrs. *Liston* had been authorized by the Plaintiff, Mrs. *Powell*, to arrange for letting the opera during the absence of the Plaintiffs from *England*.

This was the trial of the action, and Mrs. *Powell*, in her examination, denied that she had given any authority to Mrs. *Liston* to let or authorize the representation of the opera.

Ince, Q.C., and *E. W. Byrne*, for the Plaintiffs:—

The facts in this case are not disputed, except whether there was any authority given to Mrs. *Liston* to give a license for the representation of the authority. The evidence of Mrs. *Powell*, which is uncontradicted, shews that no such authority was given. The question then arises whether one co-owner of a dramatic entertainment can grant a license without the consent of the other co-owner.

By the Act for amending the laws relating to dramatic literary property, the author of a dramatic piece or entertainment or his assignee has the sole liberty of representing or causing to be represented the same, and by sect. 2 of that Act it is provided that "if any person shall represent or cause to be represented without the consent in writing of the author or other proprietor first had and obtained any such production, every such offender shall be liable for each and every such representation to the payment of an amount of not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation or the injury or loss sustained by the Plaintiff therefrom, whichever shall be the greater damages to the author or other proprietor of such production so represented." The words "author or other proprietor" include "authors" or "proprietors."

By the *Copyright Act* (5 & 6 Vict. c. 45, s. 25), the copyright in a dramatic representation is made personal property. The Defendant having only the license of one of the proprietors without the consent of the Plaintiffs, who were proprietors of the other moiety, he is liable in damages for one-half of the statutory penalty of 40*s*. for each representation of the opera. The Plaintiffs are also entitled to an injunction.

The analogy of the joint owners of a patent does not apply, for the terms of the grant of the letters patent would authorize one joint owner to use or grant licenses to use the invention: *Mathers* v. *Green* (1); *Lindley* on Partnership (2).

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(1) Law Rep. 1 Ch. 29.

(2) 4th Ed. pp. 67, 68.

Chitty, Q.C., and *Warmington*, for the Defendant:—

In this case, apart from the terms of the statute, we contend that the old rule of law as to the right of one tenant in common of a chattel to use it as he pleases, provided he does not injure or destroy it, are applicable: *Fennings* v. *Grenville* (1); *Mayhew* v. *Herrick* (2); *Jones* v. *Brown* (3); *Jacobs* v. *Seward* (4). At law one tenant in common of a chattel had in general no remedy against another, except by obtaining actual possession. There was one exception under 4 Anne, c. 16, s. 27, which provides that an action of account may be maintained by one tenant in common against the other as bailiff for receiving more than his just share, but that has no application to such a case as this. Here there is nothing alleged that can amount to an improper use of the property, and whether, having regard to the rights of the parties irrespective of the statute of 3 Will. 4, c. 15, or under that Act and the Act of 5 & 6 Vict. c. 45, we submit that the Plaintiffs' case wholly fails.

JESSEL, M.R..—

I am not at all inclined to extend the antiquated and barbarous doctrines, which have been set aside partly by the Legislature and partly by the Courts of Equity, to new rights created by statute, and which are of a character wholly different from the rights to property to which these ancient doctrines apply. Indeed, if one were to go by analogy, considering the law, whether as regarded incorporeal hereditaments or as regarded *choses in action* where there would have been no actual possession of the thing to which the owners were entitled as tenants in common, I should say the analogy was quite in favour of the Plaintiffs. Everybody knows that the right to an advowson, when it passed to coparceners, was not enjoyed by one to the exclusion of the other, but each took it in turn. So in the case of a manor, where it descended to coheiresses, the courts were held in turn. So, again, with regard to fairs and markets and like franchises, the profits were divisible between tenants in common, it being considered a right divisible in its nature. As regards *choses in action*, debts, and similar interests, tenants in common could only give a receipt for their own shares.

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(1) 1 Taunt. 241.

(2) 7 C. B. 229.

(3) 25 L. J. (Ex.) 345.

(4) Law Rep. 5 H. L. 464.

Now, all those rights are much more like the right to copyright, which is an incorporeal thing. In the case of books it is the right to multiply copies, and in the case of dramatic copyright it is the right to permit the performance of a play, or opera, or whatever it may be; so that if one is driven to analogy, which I think I am not, as regards the Common Law, I should prefer the more rational analogy and that which is more applicable to the subject-matter in question.

But I think I am not driven to that at all, because it has been long settled law that part-owners have a right to claim against each other. No doubt that was to a certain extent an extension as regards real property of the rights given by the statute of *Anne*. As regards personal property, especially as regards ships, it was a breaking in of Equity upon the ancient and inconvenient rules of the Common Law, but Equity certainly did interfere, and, either by the appointment of a receiver and manager or in some other way, secured for the various part-owners their shares of the property. I should not therefore feel very much embarrassed in dealing with the new right created by the statute, in saying that one part-owner could not exclude the other from the enjoyment of the common property; or that one part-owner could not either lend or deal with the entirety of the property without the authority of the other part-owner.

Now, with these observations one must consider what the statute is. The statute 3 Will. 4, c. 15, gives the sole right of representation, as I will call it, to the author or his assignee; it being a term of the Act that the singular shall include the plural. In this case you have two assignees, two ladies who became assignees of this opera, or the right of representing it at different times, and therefore they were strictly tenants in common or part-owners of the right of representation, or liberty of representing, as it is called. That right, I take it, could not be exercised by one of them, that is, could not be exercised by one of them in the sense, that one could give the right of representation to a third party. I am not now considering the question (it will be time enough to decide it when it calls for decision) what the respective rights *inter se* of the two co-owners would be. There is no possibility of arguing, in respect of these statutory provisions, that one of the two part-owners of the right or liberty of representing or causing to be represented could license a third person to represent without the consent of the other part-owner or owners. It is against the very essence of part-ownership or co-ownership that when there is a tenancy in common, one of the two can dispose of the right of the other, there being no partnership or other form of agency.

That being so, I should have said, independently of the provisions of the statute to which I am about to call attention, that when we find the sole right or liberty of representing vested in two persons, and one of them only gives a license to a stranger, the stranger is still accountable to the other tenant in common for having used the property, that is, the right of representation, which belonged to the tenants in common. It is made property by the terms of the statute 3 & 4 Will. 4, c. 15, and also of the statute 4 & 5 Vict. c. 45, but when I come to look at the former statute, I think it is, if possible, made plainer, because the second section says "That if any person shall represent or cause to be represented without the consent in writing of the author or other proprietor first had and obtained . . . . every such offender shall be liable for each and every such representation to the payment of an amount of not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation or the injury or loss sustained by the Plaintiff therefrom, whichever shall be the greater damages to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act."

Now, author or proprietor means authors or proprietors: so that where there are two proprietors, the one cannot represent without the consent of the other proprietor. Those are the words of the statute, using the provisions of the 4th section in explanation of the 2nd, consequently, if he does not get the consent of all the proprietors, the stranger has no right to represent at all; and, that being so, it seems to me clearly a wrongful act. It is expressly prohibited by the statute, and being a wrongful act, any person aggrieved can of course sue for the damages thereby occasioned. I have no doubt in a Court of Equity, if one of them had acquiesced, or had done anything which prevented him from suing, the other could sue for his or her share. I should have had no difficulty about that, and consequently I have no difficulty in finding the Plaintiff entitled to her share, quite irrespective of the question as to whether the deceased Mrs. *Liston* was or was not entitled.

Then that being so, the act being a wrongful one, I take it that damages may be claimed by the Plaintiff; that is, she takes her share of the forty shillings, and consequently she will be entitled to fifty-two times twenty shillings, or £52.

Solicitor for Plaintiffs: *Frederick Stanley.*
Solicitor for Defendant: *H. Lindley White.*

MILES *v.* HARFORD.

[1879 M. 61.]

M. R.
1879
July 10.

Will—Gift of Leaseholds upon Trusts to correspond with Uses of Freeholds—Shifting Clause—Remoteness—Executory Trust.

A testator devised his freehold estates in *Worcestershire* to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised his freehold estates in *Cardiganshire* to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his *Worcestershire* estates, and if his fifth son or any of his issue male should be then living, the limitations of his *Cardiganshire* estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in *Cardiganshire* to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the *Cardiganshire* freeholds.

The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the *Worcestershire* estates:—

Held, that the fifth son was entitled to the rents and profits of the *Cardiganshire* leaseholds, because they were given upon an executory trust; and, assuming the shifting clause, if applied verbatim to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection:

Held, also, that the shifting clause was divisible, and in the events which happened was not bad for remoteness.

THE object of this action was to obtain the declaration of the

Court as to the right of the Plaintiff, the fifth son of *Philip John Miles*, the testator, to the leasehold property in the county of *Cardigan* under the testator's will.

The testator had, at the time of making his will and of his death, eight sons, namely, *William Miles*, the eldest son; *Philip Miles*, the second son; *John William Miles*, the third son; *Robert Miles*, the fourth son; *George Miles*, the fifth son, the Plaintiff in the action; *Charles Miles*, the sixth son; *Edward Miles*, the seventh son; and *Henry Miles*, the eighth son.

The testator made his will, dated the 3rd of November, 1842, and thereby devised his estate, called *Leigh Court*, and all his other freehold hereditaments in the county of *Somerset*, to the use of his elder son, *William Miles*, during his life, and after his death to the use of *Philip John Miles*, the eldest son of *William Miles*, during his life, and after his decease to the use of the first and every other son of *Philip John Miles* severally and successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of *William Henry Miles*, the second son of *William Miles*, during his life, and after his decease to the use of the first and every other son of *William Henry Miles* successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of *Charles John Miles*, the third son of *William Miles*, during his life, and after his decease to the use of the first and every other son of *Charles John Miles* successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of *Arthur Miles*, the fourth son of *William Miles*, during his life, and after his demise to the use of the first and every other son of *Arthur Miles* successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of all the after-born sons (if any) of *William Miles* successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of *Philip Miles*, the second son of the testator, during his life, and after his decease to the use of his first and other sons successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of the testator's third son, *John William Miles*, during his life, and after his death to the use of the first and other sons of *John William Miles* successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of the testator's fourth son, *Robert Miles*, during his life, and after his decease to the use of his first and other sons successively according to their respective seniorities. and the heirs male of their respective bodies successively; and in default of such issue to the use of the testator's fifth son, the Plaintiff *George Miles*, during his life, and after his decease to the use of his first and other sons successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of the testator's sixth son, *Charles Miles*, during his life, and after his decease to the use of the first and other sons successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of the testator's seventh son, *Edward Miles*, during his life, and after his decease to the use of his first and other sons successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to the use of the testator's eighth son, *Henry Miles*, during his life, and after his decease to the use of his first and other sons successively according to their respective seniorities, and the heirs male of their respective bodies successively; and in default of such issue to such uses to and in trust for the testator's after-born sons (if any) for their respective lives and to their respective sons successively and the heirs male of the bodies of such sons respectively as were thereinbefore in his said will limited and contained in respect of testator's sons, *Philip Miles, John William Miles, Robert Miles, George Miles, Charles Miles, Edward Miles*, and *Henry Miles* successively, and their sons and the heirs male of the bodies of such sons respectively, the elder of such after-born sons and their issue being always to be preferred to the younger of such sons and their issue; and in default of such issue as aforesaid, to the use of the testator's own right heirs for ever.

And the testator devised his freehold hereditaments in the county of *Gloucester* to the use of trustees for a term of years to secure payment of a rent-charge during the life of his wife, which he charged on the said hereditaments, and, subject thereto, he demised the same to the use of his second son, *Philip Miles*, during his life, and, after his decease, to such uses and upon such trusts as after the decease of *Philip Miles* were by the said will declared and contained of and concerning the testator's freehold hereditaments in the county of *Somerset* antecedent to the limitation to the use of *Philip Miles* in his life, and, after the determination of such uses and trusts, to the use of the testator's own right heirs. And the will contained a proviso for shifting the uses of the testator's *Gloucestershire* estates, in the event of any of the testator's sons younger than his son *William Miles*, or any issue male of the body of any such younger son, becoming actually entitled to the possession or to the receipt of the rents and profits of the testator's freehold hereditaments in the county of *Somerset*.

And the testator devised his freehold hereditaments in the counties of *Worcester* and *Hereford* to the use of trustees for a term of years to secure payment of a rent-charge during the life of his wife, which he charged on the said hereditaments, and, subject thereto, he demised the same to the use of *John William Miles* during his life, and after his decease to such uses and upon such trusts as after the decease of *John William Miles* were by the said will declared and contained of and concerning the testator's freehold hereditaments in the county of *Somerset*, save and except the ultimate limitation to the use of the testator's own right heirs, and, after the failure and determination of all such uses and trusts, to the uses and upon the trusts by the said will declared and contained of and concerning the testator's freehold hereditaments in the county of *Somerset* antecedent to the limitation to the use of his son *John William Miles* for his life, and, after the failure or determination of all such uses and trusts, to the use of the testator's own right heirs for ever.

The will contained the following proviso:—

"Provided always and I hereby declare that if by virtue of this my will any one of my present or after-born sons younger than my said son *Philip Miles*, or any issue male of the body of such younger son, shall become actually entitled to the possession or to the receipt of the rents and profits of my said freehold hereditaments in the county of *Somerset* or in the county of *Gloucester*, and any other of such younger sons or any of their issue male shall be then living, then and in that case and so often as the same shall happen the uses hereby limited of and concerning my said freehold hereditaments in the counties of *Worcester* and *Hereford* to or in trust for any such younger son who or whose issue male shall so for the time being become entitled as aforesaid, and to or in trust for his issue male, shall absolutely cease; but my will is that if by virtue of this proviso my said freehold hereditaments in the counties of *Worcester* and *Hereford* shall have shifted to any of such younger sons or to any of their issue male and there shall afterwards be a failure of issue male of all or of the only one (as the case may be) of such younger sons, then and in that case my said freehold hereditaments in the counties of *Worcester* and *Hereford* shall return and be and remain to the uses and be held in the manner in which the same would have gone and been held if this proviso for shifting the same had not been inserted herein."

And the testator devised all his freehold hereditaments in the county of *Cardigan* to the use of his fourth son, *Robert Miles*, during his life, and after his decease to such uses as after his decease were by the said will declared concerning the testator's hereditaments in the county of *Somerset*, except the ultimate limitation to the use of the testator's own right heirs, and, after the failure or determination of all such uses, to the uses and upon the trusts by the will declared concerning the testator's freehold hereditaments in the county of *Somerset* antecedent to the limitation to the use of *Robert Miles* for his life, and from and after the failure or determination of all such uses and trusts to the use of the testator's own right heirs for ever.

The will contained the following provisoes:—"Provided always and I hereby declare that if by virtue of this my will any one of my present or after-born sons younger than my said son *John William Miles*, or any issue male of the body of any such younger son, shall become actually entitled to the possession or to the receipt of the rents and profits of my said freehold hereditaments

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in the county of *Somerset* or in the county of *Gloucester*, or in the counties of *Worcester* and *Hereford*; and if any other of such younger sons or any of their issue male shall be then living, then and in that case, and so often as the same shall happen, the uses hereby limited of and concerning my hereditaments in the county of *Cardigan* to or in trust for such younger son who or whose issue male shall so for the time being become entitled as aforesaid and to or in trust for his issue male, shall absolutely cease; but my will is that if under or by virtue of this proviso my freehold hereditaments in the county of *Cardigan* shall have shifted to any of such younger sons or to any of their issue male and there shall afterwards be a failure of issue male of all or of the only one (as the case may be) of such younger sons, then and in that case my freehold hereditaments in the county of *Cardigan* shall return and be and remain to the uses and be held in the manner in which the same would have gone and been held if this proviso for shifting the same had not been inserted herein."

"Provided always and I hereby declare that if any person whom I have hereby made tenant in tail male of any of my several freehold hereditaments shall be actually born in my lifetime, then and in every such case the estate in tail male hereby devised to such person shall cease, and in lieu thereof I devise the hereditaments hereinbefore limited to him in tail male to the use of him and his assigns during his life: and after his decease to the use of the first and every other son successively according to their respective seniorities, and the heirs male of the bodies of all such sons, the elder of such sons and the heirs male of his and their respective body and bodies always to take before the younger of such sons and the heirs male of his and their body and respective bodies."

And as to all the hereditaments in the counties of *Somerset*, *Gloucester*, *Worcester*, *Hereford*, and *Cardigan*, of or to which the testator was possessed or entitled for the life of any person or for any term or terms of years, the testator devised and bequeathed the same to trustees upon trust as to such of the same hereditaments as were situate in the county of *Cardigan* upon and for such trusts, interests, and purposes, and with, under, and subject to such powers, provisoes, and directions as, regard being had to the difference in the tenure of the premises respectively, would best and most nearly correspond with the uses, trusts, powers, provisoes, and directions in the will declared and contained concerning the testator's freehold estates of inheritance in the county of *Cardigan*, yet so, nevertheless, as not to double or increase all or any of the annual or principal sums by the will authorized to be charged thereupon.

The testator died on the 24th of March, 1845. The eldest son, *William Miles*, died in 1878, leaving issue male him surviving.

The third son, *John William Miles*, died in November, 1878, without having been married, and the fourth son, *Robert Miles*, thereupon entered into possession of the estates in the counties of *Worcester* and *Hereford*.

The greater part of the testator's property in the county of *Cardigan* was of leasehold tenure, and the Plaintiff, the fifth son of the testator, now claimed to be entitled during his life to the rents and profits of the *Cardiganshire* estate under the shifting clause, and the question was whether, the event having happened of the death of the testator's third son, *John William Miles*, in the lifetime of the fourth son, *Robert Miles*, the shifting clause took effect as regarded the leasehold portion of the *Cardiganshire* estate, or whether it was void for remoteness.

The Plaintiff claimed a declaration that he was entitled during his life to the rents and profits of the leaseholds in question.

The Defendants were *W. H. Harford* and *Philip Henry Miles* (the present trustees of the leaseholds in *Cardiganshire*), *Philip Miles* (the second son of the testator), *Robert Miles* (the fourth son of the testator), *James Miles* (the eldest son of *Robert Miles* who was born in the testator's lifetime), the three youngest sons of *Robert Miles* who were born after the testator's death, *Charles Miles* (the sixth son of the testator), and the three sons of the said *Charles Miles* who were born after the testator's death.

The Defendants *Robert Miles* and his sons contended that the proviso or shifting clause in relation to the *Cardiganshire* estate, as regarded the leaseholds, was inoperative, and had failed to take effect, and that the Plaintiff had not become entitled to a life interest therein.

Davey, Q.C., and *Bush*, for the Plaintiff:—

The Plaintiff, on the true construction of the testator's will, and in the events which have happened, has become entitled to a life interest in the leasehold property in *Cardiganshire*. The proviso, or shifting clause, is not bad, inasmuch as the condition on which it is to take effect is divisible. The mere fact that it might have failed as to the leaseholds on another event from that which actually happened, is of no moment. The testator's fifth son was alive at the time when the fourth son, *Robert Miles*, succeeded to the *Worcestershire* estates; therefore no question of remoteness can arise. Even if the condition was not divisible, we submit that the shifting clause must still take effect as regards the leaseholds as an executory trust, for the Court will mould it so as to give effect to the testator's intention.

Chitty, Q.C., and *Cozens-Hardy*, for the testator's sixth son, *Charles Miles*, and his eldest son, in the same interest as the Plaintiff.

Chapman Barber, for the trustees.

Ince, Q.C., and *Everitt*, for the fourth son, *Robert Miles*, and his sons:—

The shifting clause as regards the leaseholds in question is bad. The events contemplated are too wide, and the mere fact that the event which has happened would not postpone the vesting beyond the time of legal limitation cannot operate to give validity to a clause which is otherwise void for remoteness.

Southgate, Q.C., *Dunning*, *Rawlins*, and *Cecil Russell*, for the other Defendants.

Jessel, M.R.:—

I must say that I am very pleased to find that I am unfettered by authority as regards the first point.

In real estate wills, as I have often said and I will now repeat, I do not feel myself to have the same liberty as regards construing a will according to its meaning, as I have in the case of what are commonly called personal estate wills, and for this reason, that land in this country is held by title, and that the very complicated and curious law affecting real estates depends almost entirely on judicial decisions as to the construction of particular instruments —I mean as regards the effect of limitations—and any Judge who attempted to interfere with the authorities by starting anew, and giving a new construction to a will, because he thought it expressed something different, would be in fact legislating and making new laws as regards real property which no Judge has a right to do, and which would do infinite mischief if he were right in his conclusion that the original meaning of the words was different from that which they had been taken to bear by a long or an old course of decisions.

But I am told, and it entirely agrees with my own recollection, that there is no case in which words like these are to be found as to the trusts of real estate which has yet been decided. Consequently I have to put a meaning on words for the first time, and, that being so, it is for me to find out what the expressions mean, because that is the true meaning of all these cases on wills.

The first observation I make is, that it is what has been sometimes called an executory trust. A true executory trust is, perhaps, a little more narrow, as where a conveyance has been directed to be executed by a testator, but it is called an executory trust, and perhaps not incorrectly, where, instead of expressing exactly what he means, that is, filling up the terms of the trust, he tells the trustees to do their best to carry out his intention. In that way it is executory, that if he has not put into words the precise nature of the limitations, he has said in effect: "Now these are my intentions; do your best to carry them out," or he has used the words here, you shall hold the property on such trusts as will best correspond with something else.

Now, I want to take the exact words, and see what they mean. First, we have an ordinary devise of freehold estates in strict settlement, the only difference from the common case being that the testator, being a very rich man, and having a great many sons, attempted to found four families, and therefore divided his estates into four, and gave them over to one son in the first instance with limitations in strict settlement with remainders to the other son, and then he began with the second son with the next estate, the third son with the third estate, and the fourth son with the fourth estate, subject to the ordinary limitations as to strict settlement.

Then, having leaseholds in each of the counties in which he had freehold estates, he deals with his leasehold estates. He had copyholds also. He was aware, or rather the conveyancer who drew the will was aware, that leaseholds could not be limited in the same way as freeholds, and therefore that he must, unless he wished his will to fail to a great extent as regards his leaseholds, put in different trusts, and, that being so, he has given his leaseholds separately in this way: he has given the leaseholds in the county of *Cardigan*, with which I have to deal, "upon and for such trusts and purposes, and with, under, and subject to such powers, provisoes, and declarations as, regard being had to the difference in the tenure of the premises respectively, would best and most nearly correspond with the uses, trusts, powers, provisoes, and declarations, in the said will declared and contained of and concerning the testator's freehold estates in the same county. Then there is the common clause to prevent a tenant in tail of the leaseholds getting an absolute interest unless he attains twenty-one. Now the question is, what does that mean? It is to be "subject to such powers, provisoes, and declarations as would best and most nearly correspond," having regard to the difference of tenure. Then there is a shifting clause as regards the freeholds: having regard to the difference of tenure, if you repeated that shifting clause for the leaseholds, it would fail to a great extent for remoteness.

Again, there are limitations of the freehold estate in strict settlement to the first and other sons according to their seniorities in birth and to the respective heirs male of their bodies, so as to give them successive estates in tail male. If we imported them into the leaseholds they would fail altogether after the gift to the first. Then when you have to write it out you are to have regard to the difference of the tenure. What does that mean? when according to the tenure it will not take effect you cannot put it in; that is all. It will be absurd to suppose that you have regard to the difference of the tenure to make them best correspond when you simply made them null and void. He knows that something will not work, and he says you are to make them correspond having regard to that—that is, having regard to the effect of the tenure on the limitation or the proviso. But when you see the tenure is of such a kind that it cannot be done by literally repeating the provisions, then you must modify them accordingly. That seems to me to be exactly what the testator has told you to do—best or most nearly—that is, having regard to the assistance which conveyancers can offer—they will shew the way so to mould the trusts that, having regard to the nature of the tenure, they will not fail; and it appears to me, therefore, when you look to a trust of this kind the testator does create what I say is in the soundest sense an executive trust. The trustees cannot tell themselves, and they must get the advice of competent lawyers, and see how they can mould the trusts so as will best and most nearly correspond with the uses and trusts in the will declared concerning the testator's freehold estates in the county of *Cardigan*, regard being had to the difference in the tenure. And I venture to say there is no lawyer in the kingdom worthy of the name who would put in a clause of this kind, literally so as to infringe the rule against perpetuities; and in that view, without looking at the details of the clause, I am quite clear it would not be framed in the way suggested by those who say he does not mean that; when we come to the details of the clause it becomes more manifest, because, it being in strict settlement, there is a provision that if any of the issue male of a tenant for life shall come into actual possession of another estate, his own estate shall go over. His own either in remainder or in possession, because it may be an estate in remainder to his issue, his own estate or those who come after him in the same line, that is, if the son comes in for life his estate is to fail and that of his issue male, and if issue male come in their estate is to fail.

Therefore, what the testator has done is this: He says if any of his sons who takes an estate shall come into what I will call a preceding estate—I suppose the estates of the elder son were more valuable, and that they decreased in value as to the younger —if any son gets into the estates of an elder brother, then his own estate shall shift over to the next son. When I say the next son I include the issue male of that son.

That is the scheme of the proviso that cannot apply to the case of leaseholds, because, the strict settlement not being possible, the issue male may still come in to the freehold, the estate tail not being barred; but having no interest in the leasehold, to hold such a clause to apply throughout to the leasehold would have this most absurd effect, that if *John*, who has the leasehold estate, gets nothing, but somebody else gets another estate of freehold, he is to lose his leasehold, which of course could not be the intention. The intention of that shifting clause is, that the man is only to lose his own estate if he gets something better, or, at all events, something different, but not if he gets nothing at all; therefore, in the case I put, I mean supposing there was no rule against remoteness, it would work in this way, that somebody might get the freehold estate and would get under the will an estate in another freehold, and thereby deprive somebody else of the leasehold. Of course that cannot be meant. Then, again, the power of barring an estate tail would make a difference. You cannot bar the estate tail in leaseholds, because there is none. The clause, therefore, will not work in the same way.

Now, I am not going to lay down for the assistance of the conveyancers or anybody else what that clause ought to be, first, because I should not trust myself to draw such a clause in Court without very ample consideration; and secondly, it is so long since I have drawn clauses as a conveyancer, that I have not the same facility I once possessed. But this I will say, that I am sure there are plenty of conveyancers in *Lincoln's Inn*, and several whom I see before me, who could draw a clause which would best correspond and would give over the leaseholds in every case in which it could by any possibility be given over on the owner of it coming into possession of the other estate.

This only disposes of the question in one view, but there is another view, and, as I take an adverse view to the Defendants on this also, I think I should express my views on that. As I understand the rule of law it is a question of expression. If you have an expression giving over an estate on one event, and that event will include another event which itself would be within the limit of perpetuities, or, as I say, the rule against perpetuities, you cannot split the expression so as to say if the event occurs which is within the limit the estate shall go over, although, if that event does not occur, the gift over is void for remoteness. In other words, you are bound to take the expression as you find it, and if, giving the proper interpretation to that expression, the event may transgress the limit, then the gift over is void.

What I have said is hardly intelligible without an illustration: On a gift to *A.* for life with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to *A.* for life, with a gift over if he shall have no son who shall take priest's orders in the Church of *England*, the gift over is void for remoteness; but a gift superadded, "or if he shall have no son," is valid, and takes effect if he has no son; yet both these events are included in the other event, because a man who has no son certainly never has a son who attains twenty-five or takes priest's orders in the Church of *England*, still the alternative event will take effect because that is the expression.

The testator, in addition to his expression of a gift over, has also expressed another gift over on another event although included in the first event, but the same Judges who have held that the second gift over will take effect where it is expressed have held that it will not take effect if it is not expressed, that is, if it is really a gift over on the death before attaining twenty-five or taking priest's orders, although, of course, it must include the case of there being no son. That is what they mean by splitting, they will not split the expression by dividing the two events, but when they find two expressions they give effect to both of them as if you had struck the other out of the will. That shews it is really a question of words and not an ascertainment of a general intent, because there is no doubt that the man who says that the estate is to go over if *A.* has no son who attains twenty-five, means it to go over if he has no son at all, it is, as I said before, because he has not expressed the events separately, and for no other reason. That is my view of the authorities. This is a question of authorities.

Now, we come to the case we have before us. The estate is to go over if any of his sons get another estate, that is, if any one of his sons who has got possession of this estate gets one of the other estates, or if any of the issue male of the body of any of the sons gets the estate. Here you have two events expressed. He might have said, if any of the issue male of my body get the estate, which would have included both events, and then you could not have split it up, but he has not said so. He has divided it for some reason or other, probably a conveyancer's one, because it is an alteration of a conveyancer's form. The words "sons" and "issue male" are both added, but he has divided that and suggests two events, then and in any of the events "and so often as the same shall happen the uses hereby limited of and concerning my freehold hereditaments to or in trust for any such younger son or whose issue male shall for the time being become entitled as aforesaid, and to or in trust for his issue male shall absolutely cease." That is, there is a cesser of the estate either of the younger son or the issue male of the younger son. Why should I alter the words? Why should I say that the event of the younger son properly expressed succeeding to the estate being in due time is to be void for remoteness? The reason suggested to me is this, it is quite plain he means it to go along the whole line. I agree.

So in the case of a man dying without a son attaining twenty-five. That is not good although he means it to apply to the case of his having no son, and there is none. It is not what he means as to the event, but whether he has expressed the event on which the estate is to cease, so as to bring one alternative within the limits, and if he has chosen to say the estate is to cease first of all, as he might have said if a younger son becomes a peer or attains the age of fifty, or any other event within the limits, or any of the issue male of my younger sons shall become a peer, one gift over might be valid, he might have said if any of my issue male shall become a peer, or if the issue male of my younger son become a peer thereupon the estate shall go over, that would have been different, but I think I have no right to alter the expression. The law is purely technical. The expressions are there, and using them gives effect to the real intention. Why should I go out of my way to extend technical law to a case to which it has not hitherto been extended. It seems to me that

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I ought to read the expressions as I find them. The event which is expressed has happened. It is within legal limits, and I think the estate should go over.

Solicitors: *Warry & Co.; Bolton, Robbins, & Busk,* agents for *Jones & Forrester, Malmesbury.*

WALKER *v.* LONDON TRAMWAYS COMPANY.

M. R.
1879
June 20.

Company—Alteration of Articles—Proviso against Alteration—Resolution of General Meeting—Companies Act, 1862, *s.* 50.

A company cannot contract itself out of the provisions of sect. 50 of the *Companies Act,* 1862, by a clause in its articles excepting any regulation contained in the articles from the operation of the section, and a resolution of a general meeting of the company to alter or modify such regulation will be valid.

THE Defendant company, which was registered under the *Companies Act,* 1862, were empowered by article 105 of their articles of association to set apart 1 per cent. of the paid-up capital as a "contingencies fund." Article 130 provided that, subject and without prejudice to the powers to modify the conditions contained in the memorandum of association given by sect. 12 of the *Companies Act,* 1862, the said conditions should be deemed the only essential terms of the contract in the memorandum and articles, and that, subject thereto, and subject and without prejudice to the provisions in certain articles (including article 105), every one of the articles should be deemed to be a regulation capable of alteration under sect. 50 of the *Companies Act,* 1862.

The directors, being desirous of applying the "contingencies fund" to the repairs of the tramways (which by a former order of the Court they were precluded from doing), submitted special resolutions to a general meeting of the shareholders to alter the articles so that the "contingencies fund" might be made applicable, at the discretion of the directors, to the purpose aforesaid. These resolutions were passed, but were not yet confirmed.

The Plaintiff, who sued on behalf of himself and the other shareholders, now moved to restrain the directors from so applying the existing contingencies fund, and the question arose whether the company had power, by resolutions under sect. 50 of the *Companies Act*, to rescind or alter article 105.

Davey, Q.C., and *Stirling*, in support of the motion.

Chitty, Q.C., and *Romer*, for the Defendant company.

JESSEL, M.R., considered that no company could contract itself out of sect. 50 of the *Companies Act*, 1862; that the articles were validly altered by the resolution; and that the contingencies fund would be applicable to the purpose proposed. A declaration to that effect would be made on the resolution being confirmed.

Solicitors: *Keighley, Shea, & Bevan*; *Ashurst, Morris, & Co.*

In re HAMILTON'S WINDSOR IRONWORKS.
Ex parte PITMAN & EDWARDS.

V.-C. M.
1879
Jan. 25.

Company—Mortgage of Undertaking—Advance—Notice—Power to borrow.

15 Ch D 470
16 Ch D 445
17 Ch D 747

The mortgage of the property and undertaking of a company to secure debenture-holders or mortgagees in an equivalent position does not prevent the company from making a valid charge on a specific asset as a security for an advance of money necessary for carrying on the business.

A trading company has general power to borrow money to an extent which is reasonable and necessary for the purposes of the business.

A company assigned to mortgagees all their land, fixtures, and stock-in-trade, and their undertaking, by way of security for a sum of money then due. The company afterwards borrowed money for payment of wages and carrying on the business, and assigned to the lenders, who were aware of the previous mortgage, a sum of money which would become due to the company when certain work was completed. The lenders gave notice of this to the persons liable to pay the money. The work was completed after a winding-up order, and the money paid into Court:—

Held, that the lenders had a claim on the money so paid into Court, in priority to the claim of the mortgagees of the undertaking.

THE *Hamilton's Windsor Ironworks, Limited*, was a company established in 1865. By an indenture dated the 10th of March, 1874, and made between the *Iron Company* of the one part, and Sir *J. R. Carmichael* and *H. D. Davies* of the other part, the *Iron Company* conveyed all its property at *Garsten*, and all the buildings and fixtures thereon, to Sir *J. R. Carmichael* and *H. D. Davies*, as trustees for the holders of 1000 debentures of £100 each.

In the year 1875 the *General Credit and Discount Company* advanced to the *Iron Company* the sum of £50,000, part of which was repaid; and by an indenture of mortgage dated the 9th of March, 1877, and made between the *Iron Company* of the first part, *H. D. Davies* (who had a charge on the company for money advanced) of the second part, and the *General Credit and Discount Company* of the third part, after reciting several dealings between the two companies and *H. D. Davies*, it was witnessed that the *Iron Company* granted unto the *Credit Company*, first, about ten acres of land at *Garsten*, in the county of *Lancaster*, and all the buildings and fixtures and machinery thereon; secondly, all the undertaking of the *Iron Company*; and thirdly, all the plant, tools, stock-in-trade, money, and effects of the *Iron Company* which at any time should belong to the *Iron Company*, to hold the same (subject to the charge created by the deed of the 10th of March, 1874, but so that the deed and the 1000 debentures should remain in the custody of the *Credit Company*, and be held by them as security) to the *Credit Company*, subject to a proviso for redemption by the *Iron Company*, or by *H. D. Davies*, on payment of £45,794 and interest at 10 per cent. The 1000 £100 debentures were delivered to the *Credit Company* and remained in their possession. In 1878 the *Iron Company* were in want of money with which to pay wages and carry on business, but had several valuable contracts on hand. In May, July, and August, Messrs. *Pitman & Edwards*, insurance brokers, of *London*, made the company advances for these purposes, and on the 16th of August, 1878, the company gave Messrs. *Pitman & Edwards* a letter of hypothecation, signed by the secretary for the company, and in the following words:—

> Dear Sirs.—In consideration of advances already made, and to be made by you to this company, we hereby hypothecate to you the balance due to us, viz., £2882 10*s.*, on account of pontoons we are building for the *Mersey* Docks and Harbour Board, which we undertake to collect and hand over to you, and after repaying yourselves the amount due, you will be pleased to give us a cheque for any balance that may remain."

On the 12th of September Messrs. *Pitman & Edwards* made further advances to the *Iron Company* for wages and other pressing matters, and by a deed dated the 12th of September, 1878, the *Iron Company*, by way of security for the amount then due, assigned to *Pitman & Edwards* the £2882 10*s.* balance due to the *Iron Company* from the Dock Board on account of the unfinished pontoons, and also the pontoons. Notice of this was given to the Dock Board.

On the 17th of September, 1878, a petition to wind up the *Iron Company* was presented. Some of the pontoons were delivered to the Dock Board on that day, and the others were completed under an order of the Court, and were delivered. A balance of £1552 10*s.* was due from the Dock Board, and was paid into Court in the liquidation. A summons was then taken out by Messrs. *Pitman & Edwards*, to whom a large sum remained due from the *Iron Company*, claiming payment to them of the £1552 10s. The provisional liquidator also took out a summons for directions as to the £1552 10s. About £45,000 remained due to the *Credit Company*. It was stated that the articles of association of the *Iron Company* did not contain any clause expressly empowering the directors to borrow money.

Glasse, Q.C., and *Buckley*, for Messrs. *Pitman & Edwards* :—

These advances were made in order to enable the company to carry on business, and when the mortgages to the debenture holders and the *Credit Company* were made, it must have been intended that the managers of the company should have power to obtain money or goods on credit, otherwise the business could not be carried on. *In re Florence Land and Public Works Company, Ex parte Moor* (1) and *In re Brentwood Brick and Coal Company* (2) are clear on the point. The principles are explained in *Gibbs and West's Case* (3). The pontoons were finished by means of this money, and the lender has a right to be repaid when the pontoons are paid for. The mortgagees cannot take the benefit of our money and leave us unpaid. We should never have advanced the money except on this security, which has been perfected by notice: *Ex parte Leman* (4).

J. Pearson, Q.C., and *Whitehorne*, for the *Credit Company* :—

The cases cited do not apply to this case. We have a regular mortgage of this property, and *Pitman & Edwards* had notice of it: *Warburton* v. *Hill* (5). As between *Pitman & Edwards* and the *Iron Company*, the security might have been good, but not as against the *Credit Company*. The so-called hypothecation is not even an order on the Dock Board, but merely constitutes the *Iron Company* agents for *Pitman & Edwards* to collect the money and pay it over. The Dock Board could not have paid *Pitman & Edwards*. Our security includes all this property: *In re Panama, New Zealand, and Australian Royal Mail Company* (6);

(1) 10 Ch. D. 530.
(2) 4 Ch. D. 562.
(3) Law Rep. 10 Eq. 312.
(4) 4 Ch. D. 23.
(5) Kay, 470.
(6) Law Rep. 5 Ch. 318.

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and the *Iron Company* had no power as against the *Credit Company* to hypothecate their property, especially for a debt already due. The money was advanced before the security was given: *Bryon* v. *Metropolitan Saloon Omnibus Company* (1). This was not a debt incurred in the ordinary course of business, and the *Iron Company* could not give these creditors priority. The directors had no power to borrow money. If a general power is inferred, what limit can be placed to it? In none of the cases cited does it appear that the second mortgagee had notice of the first mortgage.

Romer, for the official liquidator.

MALINS, V.C., stated the facts of the case, and said that he understood the effect of the deed of the 9th of March, 1877, to be precisely the same, no more and no less than if on that day the *Iron Company* had issued debentures to the *Credit Company* assigning all the undertaking of the company. It had been decided, and was not disputed on either side, that the effect of such a deed was an assignment of all the property of the company. But in what sense was it an assignment of all the property of the company? Did it mean that the company was thereby disabled from carrying on its business? Certainly not. It might be that the assignees under such a deed had a right, whenever they thought fit, to enter into possession of the property and stop the operations, but the meaning of the deed was that the *Iron Company* was to be left perfectly at liberty to carry on their business, though all the property of the company was included by an assignment of the undertaking. In fact the *Iron Company* continued to carry on their business uninterrupted by the *Credit Company*, and as incidental to the carrying on of their business they had power to do all things that were necessary for the purpose. If, therefore, they were temporarily pressed for money, it was perfectly clear that they had a right to go to their bankers, or to any one, for an advance, and offer to give the bankers a certain sum of money to be received under a contract when completed. And this seemed to have been actually the case. The company borrowed money from Messrs. *Pitman & Edwards,* and gave them an hypothecation, first by a letter and then by deed. This, followed by the notice to the debtor, was quite sufficient to take the money out of the order and disposition of the *Iron Company;* that is, out of the order and disposition of the creditors, and to make it obligatory on the Dock Board to pay, not to the creditors, but to Messrs. *Pitman & Edwards.* His Lordship then proceeded :—

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(1) 3 De G. & J. 123. 12 Jur N S 1262

Mr. *Pearson* seems to have considered that there was some invalidity in the letter, because it went on, "which we undertake to collect and hand over to you," that is, "we undertake to act as your agents to receive the money, and when we get it to hand it to you." No doubt that makes the *Iron Company* agents, but apart from the fact that a subsequent deed was executed if Messrs. *Pitman & Edwards* became dissatisfied, they had a right at any moment to revoke that authority, and to say to the *Mersey* Dock Board, "do not pay to the *Iron Company,* but pay to us," and this they in fact did by their notice. There was therefore a perfectly good equitable assignment followed by a valid notice; that valid notice was acted upon by the debtors, and it is impossible, if it had not been for the deed of the *Credit Company,* that anything could be more perfect than the assignment as between the debtor and the creditor.

But the argument has been that there was a prior deed which made an assignment of all the property and undertaking of the company, and that no subsequent assignee or creditor can have a title against the prior assignee of whose title he has notice when he makes the advance. I quite agree with that proposition; and if that very debt had first of all been assigned to the *Credit Company,* and then to *Pitman & Edwards* with knowledge of that previous assignment, no such subsequent assignment could by priority of notice give them priority over a previous assignee. That has been frequently decided. Mr. *Pearson* drew my attention to the case of *Warburton* v. *Hill* (1), a decision by Sir *W. Page Wood* as to which I should have had no shadow of doubt. There are many similar decisions, and the law is thoroughly settled. I have not the slightest doubt that Messrs. *Pitman & Edwards* cannot, as they had notice of the *Credit Company's* deed

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(1) Kay, 470.

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when they got their security, have any title as against the *Credit Company* to anything which was fairly and properly included in their deed.

The question therefore is, what was included in their deed? No doubt it was a security over all the property, but it was over the property of a company which was to go on with its business, and to do all acts necessary for the conduct of that business, and I am very clearly of opinion that one of the incidents of carrying on the business is obtaining money in times of emergency. In *Gibbs and West's Case* (1) I laid this down, and I do not see any reason for departing from what I then said. It has been very strongly urged in this case, that the company having no power to borrow, the borrowing was *ultrà vires* and improper, and that, therefore, no debt was created. I should say, as indeed I have said on many occasions, that in the ordinary course of transactions of a mercantile concern, whether it be an insurance office or anything else, where the possession of money is essential for the purpose of carrying on the business, if the company finds itself in temporary difficulties for want of money, I cannot consider it beyond the powers of the directors to obtain money from bankers or from others who will lend it to them for the purpose of preventing that which would be disastrous to all, namely, the stoppage of the company. I cannot consider it beyond the powers of the directors to prevent that disaster by means of loans to a moderate extent, such as would not be unreasonable, having regard to the nature and extent of the business in which the company is engaged. Mr. *Pearson* pressed upon me very much the question whether they could borrow £100,000 in derogation of the rights of the *Credit Company*. Most undoubtedly, in my opinion, they are not permitted to do anything of the kind; but for the necessary purposes of paying the wages and buying materials to carry on their business, without which it could not be carried on and to a moderate extent, with reference to the nature and extent of the business, I am very clearly of opinion that they were at liberty to borrow; and I am very clearly of opinion that it was the intention of all the parties to the deed of the 9th of March, 1877, that they should have liberty to do so. Then Mr. *Pearson* said that they had no right to the money until the contract was completed. But they had a right from time to time to receive money, and therefore, knowing that they wanted money before the period arrived at which the debtor was bound to pay them, it was perfectly within their line of duty to borrow money for a temporary purpose, and the persons who lent it to them were Messrs. *Pitman & Edwards.*

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(1) Law Rep. 10 Eq. 312.

Now it is not necessary to go minutely into all the authorities that have been cited. I think they all agree, but if authority is needed the point is perfectly plain, from the case of *In re Florence Land and Public Works Company, Ex parte Moor* (1), in which, curiously enough, the Master of the Rolls decided contrary to his previous decision. It was an appeal from the Vice-Chancellor *Hall,* who had followed the decision of the Master of the Rolls; and the Master of the Rolls reversed himself and the Vice-Chancellor *Hall* at the same time, as they had decided that under such circumstances, there being debentures containing the usual words of assignment of the undertaking, the company were in fact completely paralyzed, as this company would have been. In that case a company gave power by its articles of association to its directors, in order to the management of the company, to borrow money by mortgage on any part of the property of the company, and the company, in pursuance of these powers, issued obligations, by each of which they purported to bind themselves, and all their estate, property, and effects, to repay the sum of £100. And it was held that, construed in the light of the articles of association, the bonds constituted a charge on the property of the company for the time being, subject to the power of the directors to dispose of such property in the ordinary course of the business for which the company was constituted. And Lord Justice *James* held that the bonds would constitute such a charge independently of the articles. That was the decision reversing, upon mature consideration, the Master of the Rolls himself and also Vice-Chancellor *Hall,* and I am bound by the reversal. But not only am I bound by that reversal, but I entirely concur in it, and I hold it to be the law that when a general mortgage of this kind is taken, whether it be by a form of debenture, or, as in the

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(1) 10 Ch. D. 530.

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present case, by a general assignment of the property of a commercial company, that, in my opinion, necessarily leaves that commercial company in possession of their property for the purpose of carrying on their business in the usual way, and of doing all things necessary to enable them to carry on the business to advantage. Amongst those must necessarily be the power of borrowing for the purpose of paying wages and buying materials.

In my opinion this sum was necessarily borrowed, the letter and deed created a valid security in favour of Messrs. *Pitman & Edwards*, and the money having been under my direction in Chambers set apart to a separate account, I am of opinion that Messrs. *Pitman & Edwards* have established their title to receive it.

Glasse, Q.C., referred to *In re Patent File Company* (1), in which Lord Justice *Mellish* laid down the proposition that a company, unless expressly prohibited, could make a mortgage.

Solicitors for Messrs. *Pitman & Edwards: Pitman & Lane.*

Solicitors for *General Credit and Discount Company: Norton, Rose, & Co.*

Solicitors for Official Liquidator: *Darley & Cumberland.*

V.-C. M.
1879
Feb. 13.

ADAMS *v.* CLEMENTSON.

[1879 A. 1.]

Copyright of Designs Act (5 & 6 *Vict. c.* 100)—*Copy of Photograph.*

The portrait of a well-known public character, copied from a photograph and applied as a design upon earthenware, is not a new and original design within the meaning of the *Copyright of Designs Act.*

THE Plaintiff, *W. Adams*, of *Tunstall* in *Staffordshire*, was a manufacturer of earthenware, and the Defendants, Messrs. *Clementson Brothers*, were also manufacturers of earthenware. The action was brought by the Plaintiff to restrain the Defendants from manufacturing or selling any articles of earthenware having applied thereon the design of the Plaintiff, which he had registered on the 17th of July, 1878, under the *Copyright of Designs Act*, 5 & 6 Vict. c. 100. The design consisted of a portrait of General *Martinez Campos*, Captain-General of *Cuba*, surrounded by a wreath.

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(1) Law Rep. 6 Ch. 83.

It appeared that orders had been received by the Plaintiff to supply plates and other articles of earthenware to a firm who required them for sale in the markets of *Cuba*. The Plaintiff had been furnished with a photograph of General *Martinez Campos*, which had been copied as the design upon the earthenware.

The Defendants had also received an order for the supply of articles of earthenware for a firm in *Cuba*, and had been furnished with a similar portrait of General *Martinez Campos*, which had been copied as a design for the earthenware and had been forwarded to *Cuba*.

Higgins, Q.C., and *Herbert Smith*, for the Plaintiff:—

We claim protection for our design under the *Copyright of Designs Act* (5 & 6 Vict. c. 100), s. 4. This design comes under class 4, as explained by the Act 13 & 14 Vict. c. 104. This Act has never been construed so strictly as the Act for the registration of patents. That principle was laid down in *Harrison* v. *Taylor* (1); *Holdsworth* v. *M'Crea* (2). Our design is new and original within the meaning of the *Copyright of Designs Act*. It is quite as much so as the designs which were protected in *Holdsworth* v. *M'Crea*, *Mulloney* v. *Stevens* (3), and *Reg.* v. *Firmin* (4). This is not like the question in *Lazarus* v. *Charles* (5), where there was a mere combination of two baskets set one upon the other, both being separately old in design.

[They referred to *Copinger* on Copyright (6).]

Glasse, Q.C., *Aston*, Q.C., and *Ingle Joyce*, for the Defendants, were not called upon.

MALINS, V.C.:—

I think the Plaintiff's case entirely fails. The right of the Plaintiff depends upon the words of the *Copyright of Designs Act*,

(1) 4 H. & N. 815.
(2) Law Rep. 2 H. L. 380.
(3) 10 L. T. (N.S.) 190.
(4) Cited 3 H. & N. 304.
(5) Law Rep. 16 Eq. 117.
(6) Page 211.

5 & 6 Vict. c. 100. That Act applies only to the right of using any "new and original design," and the protection given by the Act is for designs which shall be new and original. When the Plaintiff manufactured the earthenware in pursuance of the order received from *Cuba*, he ornamented it with a portrait of General *Martinez Campos*, and for the purpose of having the design executed he was furnished with a photograph of the General. It was probably supposed that the portrait of a public character so well known as General *Martinez Campos* would be likely to please the public who were purchasers of earthenware in the *Cuba* markets. This design was duly registered under the *Copyright of Designs Act*. The Defendant also, when he received an order from *Cuba* to manufacture a quantity of earthenware, was furnished with a precisely similar photograph of General *Martinez Campos*, and the design was placed on those articles. The Plaintiff claims as owner of the registered design to restrain the Defendant from selling any articles of earthenware having thereon a design similar to his.

Now what is the meaning of the words "new and original design"? I adhere to what I said in *Lazarus* v. *Charles* (1), where I came to the conclusion that there was nothing new in the design, which consisted of a double card basket formed of a combination of two baskets. It is very important in such cases as these that trade should not be embarrassed, and if every man who copied the photograph of a well-known public character could claim a copyright in the design, it would have the effect of paralyzing trade. The Plaintiff takes this photograph and copies it, and the Defendant does the same. Is there anything new or original in either design? I think not. It appears to me to be an abuse of the term to call this a new and original design. I therefore refuse the motion for an injunction.

Solicitors: *W. Compton Smith; Gregory & Co.*

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(1) Law Rep. 16 Eq. 117.

SILBER LIGHT COMPANY *v.* SILBER.

V.-C. M.

1879

Feb. 15.

[1878 S. 301.]

Company—Action by Shareholder—Right to use Name of Company—Company made Defendant.

Where an action was brought by a shareholder in the name of the company against the directors, alleging misapplication of the funds of the company, and a large majority of the shareholders had passed a resolution that the name of the company should not be used in the action:—

Held, that the company must be struck out as Plaintiff; but liberty given to amend the writ by adding the company as Defendant.

THIS was a summons from Chambers on the application of the *Silber Light Company* that the name of the company might be struck out as Plaintiffs to the action.

The company was formed in 1873 for the purchase from *A. M. Silber* of a patent for a particular form of lamp-burners. The capital of the company was to be £120,000 in 8000 shares of £10 each, which were subscribed for and fully paid up in the first year, and 4000 deferred paid-up shares, which were issued to *A. M. Silber* as part payment of the purchase-money. The rest of the purchase-money, amounting to £25,000, was paid in cash, and the Defendant *Silber* was to be the managing director for three years. For the first three years after the formation of the company large dividends were paid to the shareholders, but after that period the business was carried on at a loss, and at a general meeting of the shareholders, held on the 29th of August, 1878, the following resolutions were passed:—

"1. That the proceedings commenced in the action at the suit of the *Silber Light Company* and *Charles Elam* against *A. M. Silber* and two other directors of the company be discontinued so far as the use of the name of the company as Plaintiffs is concerned; and that the meeting disapproves of and disallows the use of the name of the company as Plaintiff in the aforesaid proceedings.

"2. That the company be wound up voluntarily,

"3. That *A. Allott*, accountant, be appointed liquidator.

"4. It being understood that Mr. *Silber* is prepared to enter into a contract on the terms hereinafter stated, that the liquidator be authorized and instructed to conclude a contract for the transfer of the undertaking, business, *choses in action*, and assets of the company to *A. M. Silber* on the following terms and conditions, or with such modifications as the liquidator may approve of."

Then followed the conditions, which were:—

"(*a.*) That the purchase be completed on the 15th of March, 1879, and the business and assets of the company as from the date of the last balance-sheet, transferred to the said *A. M. Silber* on that day, subject to his paying the purchase-money and transferring the shares and providing for the expenses referred to below.

"(*b.*) That as consideration for such sale and transfer the said *A. M. Silber* make over and surrender to the liquidator all the deferred shares held by him in the company, and that no claim be preferred by him in respect of such shares on the distribution of assets among the shareholders.

"(*c.*) That the said *A. M. Silber* take upon himself all liabilities of the company, and indemnify the company and the liquidator and all directors and officers of the company from all claims and demands whatsoever in connection with or arising out of the trading affairs of the company, and pay all the expenses of the liquidation. And, further, that *A. M. Silber* pay to the liquidator such a sum, not less than £32,000, as may be agreed upon, the same to be distributed rateably among the ordinary shareholders.

"(*d.*) That in the meantime and until the sale be completed the liquidator be authorized and requested to carry on the business of the company at the risk and expense of *A. M. Silber*.

"5. That there be conferred on the liquidator all the powers referred to in the *Companies Act*, 1862, s. 160, and all such other powers as may be necessary for carrying into effect the liquidation of the company, including the sale of the undertaking and the carrying on the business of the company until the completion of such sale."

The resolution that the company be wound up voluntarily was carried unanimously, and the other resolutions were carried by a very large majority, there having been 3562 votes in favour of, and

743 against, the resolutions, neither the chairman nor Mr. *Silber* having voted on any of the resolutions.

The contract for the sale of the business of the company to *A. M. Silber* was executed on the 22nd of November, 1878.

The action was brought by Dr. *Charles Elam*, who was the holder of 300 shares, upon which he had paid £10 per share, against *A. M. Silber* and the other directors of the company, alleging misconduct on the part of the Defendants in the management of the affairs of the company, and that considerable sums of money had been improperly charged to the company; and claiming an investigation of the transactions, and an account.

J. Pearson, Q.C., and *Phear*, for the liquidator:—

The Plaintiff in this action, Dr. *Elam*, has used the name of the company in defiance of a resolution passed by an overwhelming majority of shareholders. It was decided at the meeting of shareholders that the best interests of the company would be affected by the sale of the business with the assets and liabilities to Mr. *Silber*. Any action brought against *Silber* to make him pay money to the company would be subversive of the contract entered into with him, and would defeat the object of the company. *Silber* has bought all the liabilities of the company, and by so doing he has bought off all actions against himself. He would not have given the price he has contracted to pay except upon condition of stopping all litigation. Suppose any money were to be recovered from *Silber* under the charges made against him, that money would go to the company and be transferred under the contract to *Silber*; therefore the object of this action is entirely inconsistent with the contract, and it is utterly useless for any purpose. It is true that the Court will sanction the use of the name of the company by a Plaintiff in some cases, but not where it finds that the majority of the shareholders are opposed to the action. Lord Justice *James* expressed this principle in *MacDougall* v. *Gardiner* (1), when he said the Court would take means of ascertaining whether the Plaintiff represented the majority of the company. In *Pender* v. *Lushington* (2) the Master of the Rolls allowed the name of the company to remain as Plaintiffs until a meeting should have been held to decide whether the company's name was to be used or not; and in *East Pant Du United Lead Mining Company* v. *Merryweather* (1) a bill in the name of the company was ordered to be taken off the file, because it was disapproved of by a majority of the members of the company. The name of the company cannot, therefore, be used in an action contrary to the wishes of the majority of shareholders.

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(1) 1 Ch. D. 13.

(2) 6 Ch. D. 70.

Higgins, Q.C., and *Whitehorne*, for the Plaintiff, Dr. *Elam* :—

The Plaintiff, being the holder of 300 shares, has a substantial interest in the company, and there are other shareholders who side with him. They will now receive only £4 per share, and considering that large dividends were paid for the first three years, it is not to be wondered at that some of the shareholders should wish to investigate the affairs of the company, believing, as they do, that considerable sums of money have been improperly charged to the company by the Defendant and the other directors. The Plaintiff being fully determined to prosecute this action, the only question is whether he is to be allowed to use the name of the company as Plaintiffs, being at the same time willing and offering to guarantee the company against the costs. The course we propose to take was sanctioned in *In re Bank of Gibraltar and Malta* (2), *In re Imperial Bank of China* (3), and in *Menier* v. *Hooper's Telegraph Works* (4).

If this were a mere question as to the internal regulation of the affairs of the company, then the Plaintiff would not be allowed to use the name of the company, according to *Atwool* v. *Merryweather* (5). But this is a very different case, there being here charges of the most distinct character against the directors, and if they are substantiated it will be seen that the shareholders are entitled to large sums of money quite apart from any contract entered into with *Silber* for the sale of the business. If it be proved that the Defendant made charges of an improper nature, the sums he received would have to be refunded for the benefit of the shareholders. It was held in *Atwool* v. *Merryweather* that when a Plaintiff has exhausted all means of inducing the company to allow the use of its name as Plaintiffs, then the Court may interfere to sanction the name being used. But if the Court will now direct that the company shall be struck out as Plaintiffs and added as Defendants to the action, that course will satisfy the object of the Plaintiff, which is to have these questions raised upon his own responsibility.

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(1) 2 H. & M. 254. 10 Jur NS 1231
(2) Law Rep. 1 Ch. 69.
(3) Law Rep. 1 Ch. 339.
(4) Law Rep. 9 Ch. 350.
(5) Law Rep. 5 Eq. 464, n.

Sir *J. Holker,* A.G., *Glasse,* Q.C., and *F. Thompson,* for *A. M. Silber.*

Malins, V.C.:—

This is a case involving questions of considerable nicety, and I must say, of very considerable difficulty, namely, the circumstances under which a shareholder, or a body of shareholders, are or are not entitled to use the name of a company in a litigation in which they desire to embark with regard to the affairs of the company.

In the present case the *Silber Light Company* was formed in the year 1873 for the purpose of conducting the business of Mr. *Silber's* light, which was, I suppose, to some extent successful. The company seems to have treated itself at all events as very successful for about three years, for it paid very large dividends, but it then turned out either that the profits had not been made upon which the dividends had been declared, or that, having made profits up to that time, they were not then making profits, or that there was no prospect of their making profits in the future.

Therefore, in the summer of last year they came to a resolution to wind up voluntarily. That resolution was carried, and Mr. *Allott* was appointed liquidator. There was pending at that time this action, which was commenced on the 5th of July, the resolution to wind up being on the 29th of August. The statement of claim had been delivered on the 18th of July. Although the resolution to wind up voluntarily was passed unanimously, there was a contest whether Mr. *Allott* or another gentleman should be liquidator, or whether that gentleman, Mr. *Waddell,* and Mr. *Allott* should be joint liquidators. Upon both of those questions the parties who conduct this suit were in the minority. It was

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also the desire of an overwhelming majority of the shareholders of this company that its affairs should be finally closed and wound up. As a means of doing that, they entered into a resolution that all the business, the assets of the business, and the stock-in-trade, and, as it is expressed, the *choses in action* (whether that was meant to include the claims against Mr. *Silber* himself is not for me to say) was to be sold to Mr. *Silber* for £32,000. It appeared that that would secure to the shareholders who had paid £10 a share a return of £4.

This question was brought before the meeting, and a poll was taken upon it, and it was resolved by an overwhelming majority, to which I have referred, that that course should be adopted, and in pursuance of those resolutions a contract was entered into by Mr. *Allott*, as official liquidator, on the 22nd of November last, to sell everything connected with the company to Mr. *Silber* for £32,000. It is not necessary for me to enter very minutely into the merits of the case on this occasion, but I think there is considerable force in Mr. *Higgins*' observation that the official liquidator always, whether under a voluntary winding-up or a compulsory winding-up, should be perfectly indifferent in the matter between the parties, just as indifferent as the Judge whose officer he is to wind it up. I think Mr. *Allott* would have done well to have brought that contract before the Court for approval, as he might have done under the 138th section of the *Companies Act*, but he has thought fit to take the whole responsibility upon himself, and he has entered into the contract, and it has to be completed on the 15th of March next.

Now this minority of shareholders represented by Dr. *Elam* desire to go on with the litigation for the purpose of establishing a case against Mr. *Silber* and his co-directors as to their liability to pay large sums of money in consequence of misconduct, as they allege, in the management of the affairs of the company, in which they say Mr. *Silber* himself personally has received commissions and various sums which he ought not to have received, and which, if he is ordered to pay back, will go in augmentation of the funds of the company.

It struck me when this case was first opened that, if this litigation is to end in increasing the funds of the company, it would appear that the company would be the proper Plaintiff to recover those funds, and Mr. *Allott*, the liquidator, ought to be indifferent to that question; that he ought, at all events, not to discourage a litigation which may end in augmenting the funds which he may have to administer, and in which, if he fails, he will have his costs, and no harm will happen to him. But it is now perfectly manifest to me that the litigation in the name of the company will have the effect of disturbing the completion of the contract with Mr. *Silber*, and that would be most prejudicial to the arrangements of the company, that is, to the overwhelming majority to which I have referred. That majority have distinctly resolved that the name of the company shall not be used if they can prevent it. Accordingly Mr. *Allott*, the liquidator on their behalf, now moves that the name of the company shall be struck out as Plaintiffs, and that the parties, if they wish to go on, shall go on at their own risk and in their individual capacity, as they must do under any circumstances, because, if the name of the company is used, it must be under an indemnity to the official liquidator, which the solicitors for the Plaintiff have most distinctly offered throughout, offered in Chambers and also offered by correspondence before. The official liquidator, therefore, could not be damnified.

I think it is important there should be no mistake on this subject, and therefore I deliberately come to the conclusion and make this decision, so that if I am wrong it may be set right if the parties think fit. It does appear to me upon principle, that if a very large majority of the shareholders in a company deprecate a particular litigation, and resolve that the name of the company shall not be used, it is not right that the minority—especially when it is a very small minority—should have the right of dragging the company into that litigation. Therefore, on that ground I decide that the application of the official liquidator on this occasion ought to be acceded to, and that the name of the company ought to be struck out as the Plaintiff, because an overwhelming majority have said that they will not have the litigation at any price, that they disapprove of it, and that it is not beneficial to themselves or anybody concerned. I think that is an opinion which they are entitled to express, and having expressed it, I think the Court is bound, as far as it can, to give effect to it.

Mr. *Higgins* refers me to two cases—*In re Bank of Gibraltar and Malta* (1) and *In re Imperial Bank of China* (2)—in which he says the name of the company was authorized to be used, but I think that was done under very different circumstances from those existing here; and I should be very sorry if I found that a small minority could persist in dragging a company into a litigation which they see must be either wholly fruitless, or, if it should be fruitful, must be at such an expense of money and time that they have a right to put a stop to it if they can. At the same time I cannot say I am surprised that this small body of shareholders, although a minority, should feel dissatisfied with the result which has been brought about, and that they should desire to have an investigation into the affairs of the company, when I find that the concern was embarked with a capital of £80,000, and, after paying large dividends for several years, the shareholders will now have to accept £4 for each of their £10 shares.

Then it has been argued that if the Court orders the name of the company to be struck out, the shareholders in the minority will have done all they can to obtain the use of the name, and therefore will be entitled to the benefit of the decision in the case of *Atwool* v. *Merryweather* (3), and will be at liberty to go on in their own individual capacity. That is, in my opinion, another ground for refusing the use of the name of the company as Plaintiffs. But I think I must accede to the application of the Plaintiff *Elam*, that he should be at liberty to amend by adding the name of the company as Defendants. That is in analogy to what is done in many other cases; for instance, where an infant is made a party to a suit, and when he comes of age he repudiates the suit, in which case the proper course is, not to strike him off the record altogether, but to strike his name out as plaintiff and add him as a defendant.

I think the proper order will therefore be:—It appearing that at a meeting of the company a large majority has refused the use of the name of the company in this action, let the name of the

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(1) Law Rep. 1 Ch. 69.

(2) Law Rep. 1 Ch. 339.

(3) Law Rep. 5 Eq. 464, n.

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company be struck out as Plaintiff; with liberty to the Plaintiff *Elam* to amend the writ by adding the company as Defendant.

Then as to the costs of the application. The case is a novel one, and there is much to be said on both sides. Upon the whole, I think the costs of the liquidator must be costs in the winding-up, and Dr. *Elam's* costs will be costs in the action. As to Mr. *Silber's* costs, as he has been served with the summons and brought here by the official liquidator, I think his costs should be costs in the winding-up, not in the action.

Solicitors: *Vallance & Vallance; Johnsons, Upton, & Co.; Simpson & Cullingford.*

NEWINGTON LOCAL BOARD *v.* COTTINGHAM LOCAL BOARD.

[1878 N. 62.]

V.-C. M.
1879
Jan. 27.

*Sewers—Local Boards—Communications—*38 & 39 *Vict. c.* 55, *s.* 22*—Act of Parliament—Repeal of Covenant.*

22 Ch D 226-7

By an agreement between the *N.* Local Board and the *C.* Local Board, it was agreed that the *N.* Board should make a sewer and allow the sewers of the *C.* district to drain into it, but the sewage of any other districts or places was not to be permitted by the *C.* Board to pass into their sewers so as to discharge into the sewer to be made by the *N.* Board. Under Acts of Parliament then in existence, the owner of premises beyond the limits of a district had power to make a sewer to communicate with the sewers of the district, and by an Act subsequently passed similar powers were given:—

Held, that the provisions of the agreement were overruled by the subsequent Act, and that the *N.* Board could not restrain the *C.* Board and the owners of premises beyond their district from making sewers which would discharge into the sewer of the *N.* district:

Held, also, that the agreement must be taken to have been made subject to the provisions of the law then existing, under which the owners of premises beyond the *C.* district had similar powers.

THIS case came on upon demurrers to the statement of claim in an action in which the Local Board for the district of *Newington* were Plaintiffs, and the Local Board for the district of *Cottingham*, Colonel *Wilkinson*, and the *Hull Botanic Garden Company*, were Defendants.

The statement of claim stated that the Plaintiffs' district was bounded on the east by *Kingston-upon-Hull*, and on the north by the district of the *Cottingham* Board. That by an indenture dated the 18th of July, 1874, and made between the *Newington* Board, the Plaintiffs, of the first part, the *Cottingham* Board of the second part, the *Hull* Board of the third part, and the Local Government Board of the fourth part, after reciting certain arrangements between the boards, it was witnessed that they agreed (amongst other things) as follows:—

"(1.) The said *Newington* Local Board and their successors will and shall with all reasonable speed make and construct an outfall sewer from the *Spring Bank* along the site of the old *Gallow Clough* drain to the River *Humber*, of the length, size, inclination and depth shewn upon the said plans and sections hereto annexed.

"(2.) The said *Newington* Local Board and their successors will and shall, with the sanction of the said Local Government Board, testified by their affixing their official seal to these presents, allow the said *Cottingham* Local Board and their successors, and the said *Hull* Local Board of Health and their successors respectively, to cause the sewers of the said district of the said *Cottingham* Local Board and of the said portion of the said district of the said *Hull* Local Board of Health to communicate with the said outfall sewer of the said *Newington* district for the purpose of outfall of sewage. Provided always, and it is hereby further agreed and declared, that, so far as practicable, all storm waters from such districts respectively shall be prevented from flowing into the said outfall sewer of the said *Newington* Local Board, and that the sewage of any other districts or places shall not be permitted by the said *Cottingham* Local Board and their successors, and the said *Hull* Local Board of Health and their successors, to pass into their respective sewers so as to discharge into the said outfall sewer of the said *Newington* Local Board, without the consent in writing of the said *Newington* Local Board first had and obtained."

That the Plaintiffs duly constructed the said outfall drain or main sewer, and extended the same northwards to the said road called *Spring Bank*, which formed part of the southern boundary of the *Cottingham* district; and the *Cottingham* Board had constructed a sewer under the road called *Spring Bank*, which sewer communicated with the *Newington* sewer in such a manner that all sewage and water passing through the *Cottingham* sewer was discharged into the *Newington* sewer. That the *Botanic Garden Company* were the owners of a piece of land of about fifty-five acres abutting upon *Spring Bank*, which was to contain a lake of three acres, and part of which was to be laid out as building ground for villa residences. That this piece of land was not within the district of the *Cottingham* Board intended to be drained into the *Newington* sewer in accordance with the provisions of the said indenture. That the Plaintiffs had recently discovered that the *Botanic Garden Company* had laid down sewers for the purpose of draining their land and of carrying the overflow of the lake and the drainage of the intended villa residences, and had, with the consent of the surveyor of the *Cottingham* Board, connected the sewers so laid down with the said sewer under *Spring Bank*. That Colonel *Wilkinson* was the owner of about six acres of land not within the *Cottingham* district, but on the south-eastern side of the *Cottingham* district, upon which land he intended to erect buildings; and that he had laid down sewers for the purpose of draining such buildings, and intended to connect such sewers with the *Cottingham* sewers. That on the 23rd of July, 1878, Colonel *Wilkinson* applied to the justices of the *East Riding* to assess the amount of compensation to be paid by him to the *Cottingham* Board upon his connecting the sewers as aforesaid. That the *Cottingham* Board appeared by their clerk, and neither assented to nor opposed the application. That the justices assessed the compensation at £175. That the *Cottingham* Board claimed that they were entitled to permit sewage from without their district to pass into their sewer so as to be discharged into the *Newington* sewer, which claim was without foundation. That if sewers not within the *Cottingham* district were connected with such of the *Cottingham* sewers as discharged into the *Newington* sewer, there would be thrown into that sewer a much larger quantity of sewage and sewage water than the sewer was constructed to carry away, and there would be great danger of its being burst. And the Plaintiffs claimed that the Defendants might be restrained from causing or permitting sewage or surface water (other than that arising in or flowing from the *Cottingham* district) to flow or pass through any of their sewers so as to be discharged into the *Newington* sewer; and from causing or permitting to be made any new outfall into any of their sewers which communicated with the *Newington* sewer whereby any sewage or water (other than that arising in or flowing from the *Cottingham* district) might flow through any of the sewers of the *Cottingham* Board so as to be discharged into the *Newington* sewer.

To this statement of claim the *Cottingham* Board demurred, on the ground that according to the true construction of the indenture of the 18th of July, 1874, the proviso set forth did not operate to prevent such communications as at the date of the said indenture were authorized to be made by sect. 48 of the *Public Health Act*, 1848, and sect. 9 of the *Sanitary Act*, 1866, and as were now authorized to be made by sect. 22 of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55).

Colonel *Wilkinson* and the *Botanic Garden Company* also demurred.

Higgins, Q.C., and *Macnaghten*, in support of the demurrer of the *Cottingham* Board:—

Under the Act of 1875 we are obliged to allow persons outside the district to drain into our sewers. We made no agreement with Colonel *Wilkinson* under sect. 28, and we merely submitted to what we could not resist. Our agreement with the *Newington* Board must be controlled by law, and we cannot be bound to act illegally.

Glasse, Q.C., and *W. H. Green*, for the Plaintiffs:—

The agreement of 1874 must be construed according to the law as it then was. Even if the Act of 1875 gives these powers, notice of the application ought to have been given to the Plaintiffs, and they might then have successfully opposed before the justices. These agreements have always been in this form, which is nearly that used in sect. 28 of the Act of 1875, and they clearly prevent such acts as those complained of. The restriction applies not only to another "district," but to a "place" outside the district. No doubt there are cases, such as *Baily* v. *De Crespigny* (1), where a covenant has not been enforced, because an Act of Parliament has rendered its performance impossible, but that is not the case here. We ask nothing impossible. Let the Defendants make their drains into the *Hull* sewer, or make a sewer of their own, or make a contract with us.

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(1) Law Rep. 4 Q. B. 180.

Higgins, in reply:—

Even under sect. 9 of the Act of 1866 (29 & 30 Vict. c. 90), which was the law in 1874, we should have been compelled to allow these communications.

J. Pearson, Q.C., and *Borthwick*, in support of Colonel *Wilkinson's* demurrer:—

Colonel *Wilkinson* has a right to drain into the *Cottingham* sewer, and has pursued the proper course. He has nothing to do with any disputes between the *Newington* Board and the *Cottingham* Board. But whatever were the provisions of their agreement they were overruled by sect. 22 of the Act of 1875: *Brewster* v. *Kitchell* (1).

Glasse, Q.C., and *W. H. Green*, for the Plaintiffs:—

Colonel *Wilkinson* ought to have let the magistrates know that the *Newington* Board were concerned in the matter. No part of the compensation has come to us, and the *Cottingham* Board is merely trying to evade its liability under the agreement.

J. Pearson, in reply.

North, Q.C., and *B. B. Rogers*, in support of the demurrer of the *Botanic Garden Company*:—

We have made, as we were entitled to do, a connection with the *Cottingham* sewer, and now we are told that the sewer is the joint property of the two boards. It might as well be said that a highway is the joint property of two turnpike trusts. The sewage might go through half-a-dozen sewers, and we cannot be obliged to make a bargain with each. The only intention of the agreement was to prevent the *Cottingham* Board from making agreements with other boards, not to interfere with their legal liabilities.

[They also referred to sects. 13 and 15 of the Act of 1875.]

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(1) 1 Salk. 198.

Glasse, Q.C., and *W. H. Green*, for the Plaintiffs:—

Under those sections the *Botanic Garden Company* had a right to make an outlet of their own, and that is what they ought to have done. Their houses are not yet built, and they can make new sewers for them.

MALINS, V.C., after stating the facts of the case as alleged in the statement of claim, continued:—

Now, under these circumstances, it is contended on the part of the Plaintiffs that there has been such a breach of the contract entered into between the *Newington* Local Board and the *Cottingham* Local Board as entitles the Plaintiffs to an injunction. I have heard counsel for the Plaintiffs, and for all the Defendants, but I have not called upon Mr. *North* for a reply, as from the number of arguments which have been addressed to me I have heard all that could be said upon the subject.

Now, in order to support their demurrers, the Defendants mainly rest their cases on the 22nd section of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), and if that section does apply, then the Plaintiffs are wrong and the Defendants are right. Many sections of that Act have been referred to, but the defence mainly rests upon the effect of the 22nd section, and before I read the section I may say that it appears that the persons within the district have an absolute right to drainage into the sewer without consent being given, or without any penalty being imposed upon them. The provisions with regard to this subject are contained in the 21st section. [His Lordship read it.] Of course the landowner is not at liberty to make communications without control, and therefore the Act provides that he may make them under the direction of the local board so as to see that all the work is properly done; but he is not bound to make any compensation whatever, and it is his right to pass the drainage into the sewer in the district. But the 22nd section applies to those who are without the district, which is the case with regard to the Defendants Colonel *Wilkinson* and the *Botanic Garden Company*. That section enacts that "The owner or occupier of any premises without the district of a local authority may cause any sewer or drain upon such premises to communicate with any sewer of the local authority on such terms and conditions as may be agreed on between such owner or occupier and such local authority, or, as in case of dispute, may be settled at the option of the owner or occupier by a Court of summary jurisdiction, or by arbitration in manner provided by this Act." Colonel *Wilkinson*, being an occupier without the *Cottingham* district, claimed a right under that section to open into the drain, but he could not deny that he was bound to make compensation, which, if not agreed upon, was to be settled in the manner prescribed by the Act. For obvious reasons the *Cottingham* Board would enter into no arrangement or agreement, but left the compensation to be ascertained in the manner prescribed by the Act, and it was assessed at £175. Now, it was said, that whatever may be the provisions of the contract between the two local boards on the 18th of July, 1874, that contract is superseded by the Act of 1875, and several authorities have been cited upon that subject. Although the authority is old, the doctrine cannot be better put than it is in *Brewster* v. *Kitchell* (1). "Where the question is whether a covenant be repealed by Act of Parliament, this is the difference, viz., where *H.* covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant; so if *H.* covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an Act comes in and makes it lawful to do it, such Act of Parliament does not repeal the covenant."

Again, in *Baily* v. *De Crespigny* (2), certain parties entered into a covenant, and it was held "that the Defendant was entitled to judgment, for the Defendant was discharged from his covenant by the subsequent Act of Parliament which compelled him to assign to the railway company, and so put it out of his power to perform the covenant on the principle of the maxim *lex non cogit ad impossibilia*, and that it could make no difference whether the company were only empowered or were compelled to build the station on the paddock." Accordingly, if between these parties there was a covenant which was originally binding—I will assume that it was so—and if the Act of Parliament has authorized every member of the community to do that which the covenant had said they were not to do, or rather that which the local board was bound not to permit them to do, it seems to me necessarily to follow that the subsequent Act of Parliament has made that lawful, and has conferred upon every member of the community residing in the district a right to do that which the local board had covenanted he should not be allowed to do. Therefore, in my opinion, it falls strictly and literally within those decisions that a subsequent Act of Parliament does repeal the contract between the parties, and discharges the covenant between them.

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(1) 1 Salk. 198.

(2) Law Rep. 4 Q. B. 180.

Mr. *Higgins* put it, and I think put it very correctly, that the Defendants could not prevent, and therefore did not permit. Then the arguments of Mr. *Glasse* and of Mr. *Green*, who was with him and who argued the case exceedingly well, were that this covenant is absolutely binding, and the consequence of any repeal of it would be to throw great inconvenience upon the *Newington* Local Board by having their own drainage overcharged, and therefore rendering it impossible for them to work their sewer properly. The answer to that, I think, is, that there were provisions very similar to this provision in the 9th section of the Act of 1866 (29 & 30 Vict. c. 90) and in the 32nd section of the Act of 1872 (35 & 36 Vict. c. 79), which were in force at the time when this contract was entered into. [His Lordship read the sections.] There is a difference made as to the mode of settlement, but the substance of the sections is precisely the same. It appears to me, therefore, that when the *Newington* Board entered into this arrangement with the *Cottingham* Board, they were bound to consider what, under the existing law, was the chance of the drainage being increased by persons other than those who had a strict right to drain into the *Cottingham* sewer. They were bound to enter into a calculation how far the sewage would be increased, and to make their sewer of the size which was calculated not only to dispose of the actual sewage but of that sewage which would be added to it in the exercise of the power which appears then to have existed, and which undoubtedly exists, under the subsequent Act of Parliament. Therefore it is an inconvenience which, as it appears to me, they are bound to suffer, and the right is perfectly clear.

I have paid great attention to the case, which has been ably argued, and I feel bound to come to the conclusion that it is the right of every owner without the district to consider what will be most convenient to him. It cannot, I think, be better illustrated than by the case of the *Botanic Garden*, which lies immediately contiguous, so that nothing could be more advantageous to them, nothing more obvious to them when building upon their ground, than to do that which it would be their duty to do, and drain into the nearest sewer, and that sewer is the sewer of the *Cottingham* district. That is the right which they have proceeded to exercise, and that is the right which, according to my view, is clearly conferred upon them by the 22nd section of the Act of 1875.

With regard to Colonel *Wilkinson*, it seems that the case is not quite so clear. Of course upon a demurrer I cannot enter into anything that does not appear on the statement of claim, but it has been stated as a fact that Colonel *Wilkinson's* property is so situated that there are two drains into which his property might pour the sewage—the *Cottingham* sewer and the *Hull* sewer, and that Colonel *Wilkinson* has now elected to drain into the *Hull* sewer. However that may be, I do not know; but Mr. *Glasse* has made it the foundation for asking liberty to amend. I cannot think myself that it would be worth while to amend upon this subject, because if he has removed the difficulty by draining elsewhere, the Plaintiffs have nothing to complain of. I do not think it would be worth while or justifiable in me to give leave to amend on such a ground. Another topic which Mr. *Glasse* has pressed upon me is that Colonel *Wilkinson* and the *Botanic Garden Company* were bound not only to obtain the permission and settle the terms with the *Cottingham* Board, but to apply also to the *Newington* Board. I cannot agree with that, because the Act of Parliament gives the owner or occupier of any premises without the district of a local authority a right to communicate with any sewer of the local authority, and by "local authority" must be meant the local authority of the district adjoining to whom the sewer belongs.

Another question between the *Newington* Board and the *Cottingham* Board may be whether they would be entitled to a portion of the £175 compensation paid by Colonel *Wilkinson*, but that is

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NEWINGTON LOCAL BOARD v. COTTINGHAM LOCAL BOARD.

a matter between the two boards which may be settled in some other shape, and has nothing to do with the questions raised in this action. That, therefore, may be the subject of other proceedings, but cannot be entered into upon the present occasion.

I believe that those are the only points which it is necessary for me to go into. Other cases were cited which perhaps had no great application to the case before me. For instance, there was a case of *Hext* v. *Gill* (1) to shew that an apprehension of a thing being done is sufficient justification to come to the Court for an injunction, but I should have hardly thought it necessary to cite an authority upon such a subject.

Therefore, upon the grounds to which I have referred it appears to me that the *Cottingham* Board have not done anything which they were not by law bound to do. Colonel *Wilkinson* has done nothing which by law he was not entitled to do, and the same observation applies to the *Botanic Garden Company.*

I am sorry that there are so many demurrers, as one would have been sufficient for the argument; but I must allow all the three demurrers, and the usual course will be followed as to costs. I do not give leave to amend.

Solicitors for Plaintiffs: *C. A. Wright,* agent for *J. R. W. Eldridge, Hull.*

Solicitor for *Cottingham* Board: *A. R. Oldman,* agent for *Lowe, Moss, & Moss, Hull.*

Solicitors for Colonel *Wilkinson: Frankish & Buchanan.*

Solicitors for *Botanic Garden Company: Miller, Smith, & Bell.*

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(1) Law Rep. 7 Ch. 699.

FINLAY *v.* DAVIS.

[1876 F. 231.]

V.-C. M.
1879
Jan. 30;
Feb. 13.

20 Ch D 4

District Registry—Payment of Money into Court.

When an action is commenced in a District Registry and money is ordered to be paid by a receiver into Court to the credit of the action, it is not a compliance with that order to pay the money into a bank "to the credit of the District Registrar." That mode of payment is irregular, and the money will be ordered to be brought into Court under the *Chancery Funds Act and Rules.*

THIS was a partnership suit instituted in the *Liverpool* District Registry.

On the 23rd of November, 1876, an order was made by Vice-Chancellor *Malins* that a proper person (to be named by the District Registrar) be appointed receiver of the property of the Plaintiff and Defendant, to get in and receive the debts, moneys, and effects of the partnership, and manage the business pending the action; and such receiver was ordered from time to time to pass his accounts and pay the balance due from him into Court to the credit of this cause.

Subsequently an order was made by the Vice-Chancellor *Malins* upon motion directing certain partnership property to be sold with the approval of the Judge, before the District Registrar, by the receiver, who was ordered within twenty-eight days after the receipt of the proceeds "to pay the same" (the amount to be verified in the usual manner) "into Court to the credit of this action, *Finlay* v. *Davis*, 1876 F. 231." The proceeds of the sale, which amounted to £1338 8*s.* 8*d.*, instead of being paid into Court in the regular way in *London*, had been paid by the receiver into the branch *Bank of England* at *Liverpool* to the credit of "the District Registrar at *Liverpool* of the Chancery Division of the High Court of Justice," and had, therefore, never been invested or placed as money on deposit, as it would have been if paid into Court in *London.* On the 18th of November, 1878, an application was made to the District Registrar by a creditor of the partnership for payment of a debt due to him, and this application having been referred to the Vice-Chancellor, his Lordship in

Chambers, on the 9th of December, 1878, directed that out of the £1338 in the branch *Bank of England* at *Liverpool* to the credit of this action the sum of £490, which was certified to be the amount due, should be paid out to the creditor. Upon the order being presented to the Registrar of this Court for the purpose of being drawn up, together with a stamped document purporting to be a certificate under the hand of the District Registrar, whereby he certified that the fund in Court to the credit of the action amounted to £1338 8*s.* 8*d.*, the Registrar declined to draw up the order, and required that the matter should be mentioned to the Vice-Chancellor.

Ingle Joyce now requested his Lordship to give directions as to the form in which the order should be drawn up. It was considered by the District Registrar that payment into the *Liverpool* bank was the same as payment into Court; and the Registrar was in the habit of supplying what he termed "a certificate of the fund in Court."

A case very similar to this had been decided by Vice-Chancellor *Hall*—*In re Smith* (1). This custom of some of the District Registrars was there commented on by the Vice-Chancellor, who said: "I desire it to be known that such proceedings are irregular, and that in any case which may come before me I shall so treat them; and further, that moneys paid in to an account in pursuance of an order made by a District Registrar only will be so paid in at the personal risk of everybody concerned, including the District Registrars themselves." He referred to the *Chancery Funds Act*, 1872, s. 6, and the *Chancery Funds Rules*, 1874, r. 28.

MALINS, V.C., said he entirely agreed with Vice-Chancellor *Hall*, and was of opinion that the payment into a bank at *Liverpool* was most irregular and improper. He ordered that the entire sum in the *Liverpool* bank should be brought into Court in the manner required by the *Chancery Funds Act and Rules;* and after being so brought into Court the amount found to be due to the creditor of the partnership should be paid, with the costs of this application.

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(1) 6 Ch. D. 692.

Feb. 13. The case was again mentioned to the Court this day.

MALINS, V.C.:—

The question is, whether when the Court orders money to be brought into Court that order is complied with by the District Registrar paying the money into the branch *Bank of England* at *Liverpool* in his own name. Mr. *Lowndes*, the District Registrar, has attended me and explained that cases have occurred before the Master of the Rolls in which his Lordship has approved of this course being adopted, but in the case of *In re Smith* (1) Vice-Chancellor *Hall* seems to have taken quite a different view of the matter. It would be very desirable that in a question of this nature there should be no difference as to the practice of the Courts. I think all the Courts should act upon the same principle, and I should suggest that it would be better to take the opinion of the Court of Appeal. Mr. *Lowndes* stated that the Lords of the Treasury have sanctioned the course he has pursued, but that would not be sufficient to guide the practice of this Court. I can well understand that there might be cases in which the payment of money into a bank would be convenient, but still it would not be, in my opinion, a compliance with an order made to pay the money into Court.

Ingle Joyce referred to the fact that in consequence of the money having been paid into the bank at *Liverpool*, there had been a loss of at least £60 in the amount of interest that would have been received if the money had been paid into Court and invested by the Paymaster-General.

MALINS, V.C.:—I think under the circumstances that the best course will be for me to order the money to be paid into Court, and if any one thinks that this order is wrong it can be taken before the Court of Appeal. I agree with Vice-Chancellor *Hall* that money ordered to be paid into Court should be paid in under the *Chancery Funds Act and Rules.*

Solicitors: *Gregory, Rowcliffes, & Rawle.*

(1) 6 Ch. D. 692.

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1878
March 15, 16, 19.

NANT-Y-GLO AND BLAINA IRONWORKS COMPANY *v.* GRAVE.

[1877 N. 65.]

Company—Shares accepted by a Director from Promoters—Trustee for the Company—Liability of Director—Misfeasance—Amount and nature of Relief—Promoter.

14 Ch D 393

The principles laid down in *McKay's Case* (1) and *Pearson's Case* (2), viz., that a director being in a fiduciary position to his company cannot retain a consideration received by him from the promoters as an inducement to become a director; and, if the consideration has been a gift of fully paid-up shares, that he may be compelled not only to restore the shares, but to account to the company for the highest value to be attributed to them since they have been in his possession—are equally applicable to proceedings in an action by the company to recover the value of the shares, as to proceedings under the *Companies Act*, 1862, s. 165, for the same purpose.

The director is further chargeable with interest on the highest value of the shares.

Previously to the incorporation of a company fifty fully paid-up ordinary shares were offered to *G.* by the promoters to induce him to act as a director. *G.* consented to act as a director, and fifty shares of £100 each (part of a large number of paid-up shares retained as commission by the promoters on the sale of the works to the company) were transferred into his name without any consideration. *G.* acted as director for three years, and assisted in carrying into effect the contracts for purchase, but was not aware of the amount of commission retained by the promoters. In 1871 these ordinary shares were quoted at £80 a share. In 1874 *G.* ceased to be a director. In 1877, when these shares were only quoted at £1 per share, the company commenced an action against *G.*, claiming a declaration that he was a trustee of these fifty shares for the company, or of the value of them at the election of the company with interest, and for an account:—

Held, that *G.* was a trustee of these shares for the company; that restitution of these shares was not sufficient; and that as the company had elected to take the value of these shares, *G.* must pay to the company £80 per share on each of the shares transferred to him, with interest at 4 per cent. from the date of transfer, and the costs of the action.

ACTION by the *Nant-y-glo and Blaina Ironworks Company, Limited*, against Mr. *John Grave*, a former director, claiming a declaration that the Defendant was a trustee of certain shares for the Plaintiff company, and also that he might, if the Plaintiff company should so elect, be ordered to account to them for the highest value the shares had reached in the market.

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(1) 2 Ch. D. 1.

(2) 5 Ch. D. 336.

The Plaintiff company was incorporated on the 25th of July, 1871, and one of the objects for which it was established was stated in the memorandum of association to be the carrying into effect of the following agreements, or any modification thereof which might be agreed upon between the respective parties thereto and the company:—(*a*) An agreement dated the 22nd of July, 1871, made between *John Richardson* and *James Carlton* of the one part, and *George Henry Dean* of the other part, for the purchase of the *Nant-y-glo* works and property connected therewith; (*b*) An agreement dated the 22nd of July, 1871, made between the *Blaina Iron and Coal Company, Limited*, of the one part, and the said *George Henry Dean* of the other part, for the purchase of the *Blaina Ironworks.*

The capital of the company was stated to be £750,000, divided into 7500 shares of £100 each.

The registered articles of association of the Plaintiff company provided: (63) That every member holding not less than ten ordinary or preference shares should be eligible as a director. (65) That the Defendant, *John Grave*, and certain others should be the first directors of the company. (77) That the directors might carry into effect the said agreements for the purchase of the *Nant-y-glo and Blaina Works*, with their appurtenances, in such manner and with and subject to such modifications, and with such evidence as to title or otherwise as they in their discretion should determine. (99) Provided for the remuneration of the directors at £500 for the chairman, £400 for the deputy-chairman, and £200 for the other directors, with an additional sum equal to 5 per cent. of the net profits divided in excess of 8 per cent. on the paid-up capital.

During the formation of the company, and previously to its incorporation, Mr. *John Richardson*, one of the promoters and a brother-in-law of the Defendant, applied to the Defendant and requested him to become a director of the Plaintiff company, offering him as an inducement fifty fully paid-up postponed shares in the company, receiving dividend subject to a dividend of 8 per cent. being paid on the ordinary shares in addition to the remuneration provided for a director.

The Defendant was ultimately induced upon these terms to sign the memorandum of association for ten shares, and to act as one of the original directors, and thereupon fifty fully paid-up shares (part of £212,500 worth of ordinary shares that had been retained by the promoters as part of their commission on the sale to the company) were duly transferred into his name, without any consideration having been paid by him for such transfer.

The Defendant acted as a director of the company from its incorporation until the 7th of January, 1874, and in that capacity assisted in carrying into effect the above contracts for the purchase of the property by the company.

At the end of the first year the ordinary shares paid a dividend of 6 per cent., and were quoted in the market at £80 a share. In the year 1874, when the Defendant was no longer a director, the Plaintiff company instituted proceedings in Chancery against the promoters, *James Carlton*, *John Richardson*, and *Albert Grant*, to recover the promotion money, of which the above-mentioned £212,500 worth of ordinary shares formed a part.

This suit was eventually compromised, but the Plaintiff company specially excepted out of the operation of such compromise all claims they might have against the original directors in respect of any shares allotted or transferred to such directors by *James Carlton*, and *Albert Grant*, or either of them.

It appeared that at the time the Defendant accepted these fifty shares he knew nothing about the enormous commission retained by the promoters, and he further stated in his evidence that had he been aware of it at the time nothing should have induced him to become a director.

In July, 1877, the present action was commenced against the Defendant, claiming a declaration that the Defendant was a trustee for the company of these fifty shares, or of the value thereof respectively, at the election of the Plaintiff company, and also of all other benefits, if any, which the Defendant obtained from the promoters of the Plaintiff company, and that the Defendant might be ordered to account for and pay the value of all such shares, and other benefits respectively, estimated as at the time of obtaining the same, or at such other time as the Court should think fit, with interest thereon as the Court should direct. As at this date the ordinary shares in the company were only quoted at £1 a share, the Plaintiff company now elected to take the highest value of these shares after the time when the Defendant received them. The Defendant contended that, even assuming the Plaintiff company were entitled to relief as against him, they were not entitled to recover the value of the shares in the event of his being able to transfer or surrender the same to the Plaintiff company.

Kay, Q.C., and *E. S. Ford*, for the Plaintiff company :—

That these fifty shares were gratuitously transferred by the promoters to the Defendant as an extra inducement to him to become a director is not denied. By undertaking the office of director he puts himself in a fiduciary position towards the company; and by accepting these shares he also became the paid agent of the promoters; therefore in any question between the company and the promoters his duty and his interests were in conflict. As one of the acting directors he has had the carrying out of the contracts for purchase of the company's property, out of which such an enormous commission has been retained by the promoters; he is therefore guilty of misfeasance, and is within the principle laid down in *Pearson's Case* (1), *Ormerod's Case* (2), *McKay's Case* (3), and *De Ruvigne's Case* (4). True, these cases were all cases under the 165th section of the *Companies Act*, 1862; but that, we submit, makes no difference. The same question was decided in the *Phosphate Sewage Company* v. *Hartmont* (5), which was a case not under the 165th section.

There has been no acquiescence on the part of the company in this case, and even if there had been it is no bar to an action by *cestuis que trust* against their trustees or other persons in a fiduciary position. The general rule prohibiting a trustee from dealing with the trust funds applies with still greater force to a case like the present, where the director is the paid agent of the promoters, and consequently cannot be free and unprejudiced in giving his advice

(1) 5 Ch. D. 336.
(2) 25 W. R. 765.
(3) 2 Ch. D. 1.
(4) 5 Ch. D. 306.
(5) 5 Ch. D. 394.

and assistance: *Benson* v. *Heathorn* (1). As director the Defendant is liable to restore the shares or money, or the money's worth at the option of the company: *Tyrrell* v. *Bank of London* (2); *Bagnall* v. *Carlton* (3); *Panama and South Pacific Telegraph Company* v. *India Rubber Works Company* (4). The compromise does not help the Defendant, because under that our rights as against him were specially reserved.

Sir *John Holker*, A.G., *Hemming*, Q.C., and *Sangster Green*, for the Defendant:—

The Defendant took no part in the preliminaries in the formation of this company, nor in the negotiations for the purchase of the property of the company. When he became a director the agreements for purchase were all made and ready for signature; he had no knowledge that these shares were improperly received by the promoters, or of the enormous amount of the promotion money. We contend that this transfer was in no sense a gratuitous one: the Defendant gave valuable consideration; he was a man occupying a good position as Mayor of *Manchester*, with an influential name, and conversant with business, and he gave his valuable time and services to the company; besides these shares being deferred shares the company had to earn sufficient to pay 8 per cent. on the preferred shares before these shares could receive anything. The Defendant therefore as director had to work hard in getting the company into a thriving condition before he personally could derive any benefit from these shares; his duty therefore and his interests were identical. *Pearson's Case* (5), *De Ruvigne's Case* (6), and *Ormerod's Case* (7), were all under the 165th section of the *Companies Act*, 1862; and it was because the proceedings were of that nature that restitution was held not to suffice. Those cases, therefore, do not apply here where no case of fraud is made out against the Defendant. These shares were not given to bribe him not to do his duty, but merely as an inducement to get him to act.

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(1) 1 Y. & C. Ch. 326.
(2) 10 H. L. C. 26.
(3) 6 Ch. D. 371.
(4) Law Rep. 10 Ch. 515.
(5) 5 Ch. D. 336.
(6) 5 Ch. D. 306.
(7) 25 W. R. 765.

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As to the relief claimed. The Defendant, if held liable at all, is willing to restore these shares, with all the dividends he has ever received on them, with interest at 5 per cent. on his receipts; and that is all the Plaintiffs can claim. They have no right to have the money value of these shares estimated at their highest value, and still less to have interest on that. In no case has such interest been given, and in one case it was refused expressly on the ground that the highest value of the shares was taken simply as the measure of damages. The full nominal value of the shares was awarded in those cases under the 165th section only by way of visiting the wrong-doer with exemplary damages. Besides, there has been great laches on the part of the company. In January, 1874, when they first had an opportunity of making this claim, these shares were quoted in the market at £70 per share, and, assuming that their claim was successful then, the Defendant would only have been a loser then to the extent of £10 a share, being the difference between the present and the highest value, £80. Instead of that they wait till now, when the shares are only quoted at £1, before making their claim; this is most inequitable and cannot be allowed. Then, again, these shares are not similar to those subscribed for and allotted to the public; the shareholders, therefore, lost nothing by this transfer. In this case the Court is not assessing damages for misfeasance under the 165th section; therefore, if it is to proceed to give relief at all, it can only be on the principles on which it acts towards ordinary trustees; and in dealing with the analogous case of a purchase by a trustee from his *cestuis que trust*, restitution with an account of all profits made would be all that would be decreed. This clearly appears from *Hall* v. *Hallet* (1). The same view is supported by *Ex parte James* (2); *Lyon* v. *Home* (3); *Great Luxembourg Railway* v. *Magnay* (4); *New Sombrero Phosphate Company* v. *Erlanger* (5).

Kay, in reply:—

Very likely the Defendant asked no questions about the pro-

(1) 1 Cox, 134.
(2) 8 Ves. 337, 351.
(3) Law Rep. 6 Eq. 655.
(4) 25 Beav. 586. 4 Jur. N.S. 877
(5) 5 Ch. D. 73.

motion money, but he ought to have done so. No doubt his intentions were perfectly honest, but he must suffer for his carelessness. Restitution of these shares will not meet the justice of the case; besides, we are entitled to exercise an option, and we claim the value of the highest market price. This, according to the principles of *Pearson's Case* (1) and *De Ruvigne's Case* (2), is what we are entitled to, since we elect to take the value, and not restoration of these shares.

BACON, V.C.:—

The question in this case is simply one of law. The facts, which are not in dispute, are that *Richardson* and *Carlton*, having made certain contracts with the vendors of these two properties, afterwards transferred the subject of those contracts to the company, and in doing so they did that which is wholly unlawful; they received for themselves money and shares to such an extent as rendered them liable to refund to the company the extra price which they had received. I may mention only the last case on the subject before the Court of Appeal (*Bagnall* v. *Carlton* (3)), as clearly establishing that principle. Then, being, as they were, promoters of the company, they cast about to find other promoters, and a letter was addressed by Mr. *Richardson* to the present Defendant, Mr. *Grave*, in which he explained to him that operation which he then desired to effect for the promotion of the company, and suggested the desirability of having for directors persons of weight and consideration—persons whose names would be likely to inspire confidence in the public, and asked Mr. *Grave* to become a director. Mr. *Grave* agreed to become a director, and he agreed on the terms of receiving the remuneration which the articles provided for the directors, namely, £200 a year, and a further proportionate division of profits, if there should be profits, and also that he should have fifty of these deferred shares which at that time had been parted with by the company, or agreed to be parted with by the company, to the other promoters. I do not think it would be forcing the law of this case in the slightest degree to say, that from the time that the letter was

(1) 5 Ch. D. 336.

(2) 5 Ch. D. 306.

(3) 6 Ch. D. 371.

V.-C. B.
1878

NANT-Y-GLO AND BLAINA IRONWORKS COMPANY *v.* GRAVE.

received, and adopted, and acted on, Mr. *Grave* became as much a promoter of this company as any other person engaged in it. Then having agreed to become a director, he at the same time agrees that he shall have, not a sum of money, but the value of money paid to him for his services. He does become a director, he does attend the meeting at which the articles are agreed to, and the prospectuses issued, he acts in all respects as a director, takes an active and prominent part in the way of moving resolutions and so on, and continues to act from that time till 1874. In the course of that time, having stipulated for fifty shares, nominally worth £5000, he gets them transferred to him in the month of September, 1871. Now, the value of those shares at that time may be estimated in some degree—I do not mean conclusively or for the purpose of decision—by Mr. *Grave's* own notion on the subject. He said he looked into the matter, he saw the valuations which had been made of this mine, and in his own mind he applied that knowledge of business which he has to the subject, and came to the conclusion that 10 per cent. might be fairly expected from the working of the mine. Therefore he agreed to become a director on being paid £200 a year for salary, and he acquired also, or accepts at least, £500 a year, being 10 per cent. on the fifty shares which he was to have. Is that a transaction which, between directors and the company of which they are directors, can be sustained on any principle of justice or reason? I am not talking now about the law. That there was a fiduciary relationship subsisting between the Defendant and the company it is impossible to doubt, and it would be idle to argue. What was his duty as a director? He himself says, to render all his services to the company—his services, active, personal, and intellectual. If he had known, the first hour he sat as a director, what the true nature of this transaction was (and whether he knew it in fact or not is indifferent, because he must be taken to have known it) he must have been convinced that the transaction in which the company had been involved was an unlawful one, and that the company could, as in *Bagnall* v. *Carlton* (1), undo the transaction, and compel restitution and the giving back of that unlawful gain which had been made by the promoters. But how could he discharge his duty to the company if at the same time he had received a retaining fee worth £500 a year from the promoters? His duty and his interest were in conflict, and it comes within that description of cases which the Court has so often to deal with, between trustees and *cestuis que trust.* The moment he knew that fifty shares had passed to the promoters of the company, and by them had been transferred to him, he must be taken to have known that those shares belonged to the company, and that they could by law compel the restitution of them. I acquit Mr. *Grave* most readily, without the slightest qualification, of any intention to do what he thought or believed was wrong; but that he did wrong is plain, unless all the decisions which have been referred to are erroneous. The shares were the shares of the company. If they had remained in the hands of the promoters, the company could have compelled the relinquishment of those shares by those who had so received them. Is there any difference between the promoters who had received them and Mr. *Grave*, in that sense a promoter, who, knowing that they had come from the company to the original promoters, takes them from them by way of a present, in order that he may discharge the office of director of the company? It would be fraught with the greatest danger to society if any such principle could for a moment be maintained.

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(1) 6 Ch. D. 371.

It is suggested that there was nothing dishonest in the original transaction. Well, in the general sense of dishonesty, I am quite ready to admit that there was nothing dishonest. He may inadvertently, without bestowing as much reflection on the subject as it deserved, have thought he was at liberty to take £500 a year, or shares worth it, from the promoters of the company, and at the same time discharge his duty as director. Except that he had misunderstood his position, the nature of the duties which he had undertaken towards the company, and the interests which he had acquired under the transaction with the promoters, I am willing to believe that there was no improper intention on the part of Mr. *Grave.* Beyond that it is impossible to go, because the law on the subject is perfectly plain and admits of no possible doubt. *Pearson's Case* (1) and *McKay's Case* (2) were referred to, and the

(1) 5 Ch. D. 336.

(2) 2 Ch. D. 1.

V.-C. B.
1878

Nant-y-glo and Blaina Ironworks Company v. Grave.

only distinction which could be drawn, or was attempted to be drawn, between them and the present case was that they were cases under the *Companies Act*, and this was a demand made in an action. But there is not one law for proceedings under the *Companies Act* and another law for an action. The *Companies Act* only recognises the principle of law. It uses the word "misfeasance," which is a word of very wide signification. It means "wrong-doing," and if a trustee, a man who is engaged in a fiduciary relation with any other body or person, does that which is wrong, this Court has the power, and has in all times exercised the power, of setting that to rights. Unless there is to be one law, or one principle of law, administered under the Companies Acts, and another in actions in this Court, there is no ground for even the most shadowy distinction between the two cases. But it is not confined to that. In *Phosphate Sewage Company* v. *Hartmont* (1), (which was not a proceeding under the *Companies Act*, although in the course of it that Act was referred to), the plain principle of law there enunciated is, that the company have a right to compel the restitution or the return of every property of whatever kind which has been received by an agent while in the discharge of his duty. Here it is not admitted, but it is argued, that it was for the discharge of his duty as a director that he took these fifty shares. I find it impossible to distinguish *Pearson's Case* (2) from this case in point of fact, and if the principle be the same there is an end of all argument on that subject.

It has been contended that it would be enough if Mr. *Grave* now, without admitting, or not admitting, the right of the Plaintiff's claim, gave back the shares which he has; but that, in my opinion, would fall far short of the justice of the case. The case referred to of *Hall* v. *Hallet* (3), where the Court declined to compel the defaulting trustee, who had sold shares improperly, to go into the market and get those shares and pay them back again, though none the worse for being an old case, has not been followed by any case that I know of. However, the difficulty there was very great. I do not know how the Court could have made the decree that he should go and buy the shares. There might have been no shares saleable. It might have been out of his power to buy them at any price, and the Court, having the whole of that case before it, thought that justice would be done by compelling him to pay the value of the shares. But that is no authority for saying, when a clear breach of trust has been committed, the defaulting trustee can acquit himself of all obligation by giving back the thing which he has received. In the present case the value, it seems, has come to be very small. In December, 1871, and in September, 1871, the value of the shares was £80 each. They are now worth £1. During all this time the Defendant has had the shares, he has had the power of dealing with them in any way he thought fit, and has thought it advantageous to his interests that he should retain them. He may have had very good reason for that, because he says he still thinks that, properly managed, this would be a flourishing concern, and is worth the money which has been paid for it. I can find no authority, and no case has been referred to except *Hall* v. *Hallet* (1), which I have mentioned, in which the Court has confined its power of relief to the mere restitution of the thing which has been taken away. *Lyon* v. *Home* (2) was referred to, in which the Defendant was required to transfer a sum of Three per Cent. Consols which he had wrongfully possessed himself of. That did full justice in that case. But if a man in Mr. *Home's* position were to sell the consols, and sell them in a falling market, and were to sustain a great loss, measured by the difference between the nominal value of the stock and the price at which he sold, could it be said that that case was any authority for saying the Plaintiff would be only entitled to the diminished sum to which the original stock had been reduced by the misconduct of the person who held it? Indeed, I can find no authority in any case which has been referred to for saying that the justice of such a case as this before me would be met, now that the shares which were once worth £80 are only worth 20*s.*, by a mere restoration of these shares to the company.

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(1) 5 Ch. D. 394.

(2) 5 Ch. D. 336.

(3) 1 Cox, 134.

Another point argued was, that there had been laches or acquiescence on the part of the Plaintiff company—that knowing their rights they had slumbered on them, and therefore had altered the position of the Defendant. I am at a loss to perceive in what way the Defendant's position has been altered. Being legally master of these shares, he has chosen to do what he has done. His position is exactly the same. The shares may be worth less to-day, but what they may be worth this day twelve months I do not know, and I cannot speculate upon. But his position is in no degree altered. What have the Plaintiffs done? Having discovered the wrong which had been done to them by *Richardson* and *Carlton*, they find themselves under the necessity of suing them; and, in the course of that suit, they find out a great deal they did not know before, as must be assumed, and they are at length induced to effect a compromise with *Richardson* and *Carlton*, and in effecting that compromise they carefully say they reserve the rights which they thought they had then, and which they assert by this action, against, amongst others, the present Defendant. The compromise, therefore, does not affect them, and the acquiescence is accounted for, in my opinion, reasonably enough, by the circumstances of the case, and I do not find anything done by the Plaintiffs that should induce Mr. *Grave* to think they have ever relaxed or changed their intention of making him answerable, or that they have done anything which could mislead him in the slightest degree. These are the grounds on which the case has been resisted, and none of them, in my opinion, furnish a sufficient defence. That the Defendant was in a fiduciary relation to the Plaintiffs is beyond dispute, and while in that fiduciary relation he took, not money, but that which represented money, for the purpose of enabling him to discharge his duties to the Plaintiffs as a director. The money he received for that purpose belonged to the company, because he was the paid servant of the company. I use that word not, of course, in any offensive sense, as no offensive word has been addressed to Mr. *Grave* or to his conduct; the most that is said is that he misunderstood his position. It is the same as if the shares had never been transferred by the company, or merely as if the shares had been transferred at the price of £80, and the trustee had received the £80 instead of the company. Now that seems to me to be the relief which was given in *McKay's Case* (1), which was given in *Pearson's Case* (2), which was given in the *Phosphate Sewage Company* v. *Hartmont* (1), and which is involved in the principle of the decision in *Bagnall* v. *Carlton* (2); and, in short, I have heard no case in which the principles which I have said seem to me to regulate this particular transaction are in the slightest degree called in question. Whatever the Defendant did derive, or might have derived, from this transaction, he is accountable for to the company. The duty of an agent was carried to a very great length in a recent case in the Court of Appeal of *Patterson* v. *Gaslight and Coke Company* (3), which I mention only as an instance of the jealousy with which the Court looks on persons who, having been paid for the discharge of a particular service, desire to add to that payment by something connected, or not connected, with the suit in which they are engaged. On that principle, and on the principles which I must hold to be now very plainly established by the several cases which have been referred to in the course of the argument, and which are identical in principle, if not altogether in fact, with the case before me, I am bound to hold that Mr. *Grave* is responsible to the company for at least that £80 per share for which he admits the shares might have been sold in the year 1871. The judgment will therefore be for payment, within a month from the service of the order, of £80 a share on the fifty shares, with interest at 4 per cent. from the time that he received these shares, and the costs of the action.

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(1) 1 Cox, 134.

(2) Law Rep. 6 Eq. 655.

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(1) 2 Ch. D. 1.

(2) 5 Ch. D. 336.

MINUTE OF JUDGMENT:—This Court doth order and adjudge that the Defendant *John Grave* do within one calendar month after service of this order pay to the Plaintiffs, the *Nant-y-glo, &c., Company*, the sum of £4000, being £80 per share on each of the fifty shares so transferred to him as in the pleadings mentioned, together with interest thereon at the rate of 4 per cent. per annum from the 8th of September, 1871, the date of such transfer. Defendant *John Grave* to pay the costs of the action.—*Reg. Lib.* 1878 B. 573.

Solicitors for Plaintiff Company: *Shaw & Tremellen.*
Solicitor for Defendant: *R. Freer Austin.*

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(1) 5 Ch. D. 394. (2) ~~5~~ Ch. D. 371. 6/
(3) 2 Ch. D. 812.

WHITE *v.* HIGHT.

[1869 W. 92.]

V.-C. B.
1879
July 26.

Will—Construction—Real Estate—Clear Gift followed by ambiguous Expression—Words—Leaving Issue.

Testator devised real estate to his granddaughter absolutely, and "after her decease without leaving any issue," over.

The granddaughter married and had a child:—

Held, that upon the birth of a child the granddaughter's interest became indefeasible.

13 C.D.
84 B.D.

PETITION.

Samuel Gowers, who died on the 17th of October, 1868, by his will, dated the 16th of October, 1868, devised and bequeathed hereditaments and premises, partly freehold and partly copyhold, called *Brook Farm*, to his granddaughter *Alice White*. He continued: "But in case of the said *Alice White*, my granddaughter, shall happen to depart this life before the decease of her said mother" (an event which did not happen) "or after her decease without leaving any issue, then and in such case I give and bequeath and devise my said last-mentioned real hereditaments and premises and fixtures unto my second daughter *Elizabeth Frances Hight*, wife of Captain *Edward Hight*."

On the 28th of July, 1874, *Alice White* married *Montagu Hepworth*, and there were now two children of the marriage living.

Mr. and Mrs. *Hepworth* presented a petition in the suit (which was for administration), praying that it might be declared that according to the true construction of the will, by the birth of the children of *Alice Hepworth*, her estate in the hereditaments called *Brook Farm* had become absolute; and for consequential orders.

Sir *H. Jackson*, Q.C., and *Maidlow*, for the Petitioners:—

Upon the birth of a child the interest of Mrs. *Hepworth* became absolute. The words "after her decease without leaving any issue" are to be read as "in the event of her dying without having had issue": *Treharne* v. *Layton* (1).

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(1) Law Rep. 10 Q. B. 459.

The expression is at least ambiguous, and the Court always leans against divesting a vested interest.

The will was drawn by some one who was not an expert, and the popular meaning of the phrase "without leaving any issue" is "without ever having had issue": *Theobald* on Wills (1).

A clear vested interest will not be cut down by a subsequent ambiguous expression: *Casamajor* v. *Strode* (2). "The object of the law is to vest property as early as possible, and not to delay the vesting": *In re Brown's Trust* (3). If these words had followed the gift of only a life estate to *Alice White*, the case would have been substantially different.

J. Ashton Cross, for the trustees.

Rigby, for Mr. and Mrs. *Hight* and their children:—

There are occasional instances in which the Court, for very good reasons, has read words like these in the way in which the Petitioners propose to read them. But there is no sufficient reason here why the Court should give any other than the natural meaning to the words. They clearly import an executory devise over in the event of Mrs. *Hepworth* dying without leaving issue surviving. It cannot be disputed that the testator did intend in some event to cut down the absolute gift; and the Petitioners claim to minimise that reduction to the utmost, by seeking to apply those authorities in which "without leaving issue" has been held to mean "without having had issue." The instances in which the Court has so read the words "without leaving issue" are cases where it was necessary so to read them in order to prevent the failure of a limitation to a class, whether preceded or not by a life estate. No such necessity arises here. It will be an entirely new thing if the Court should interpret this expression in the way proposed, in any case where such an interpretation is not absolutely necessary in order to make the limitation fit in with a previously indicated intention of the testator.

Treharne v. *Layton* (4) only follows a string of authorities where such an interpretation as is here contended for was necessary.

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(1) Page 381.

(2) 8 Jur. 14.

(3) Law Rep. 16 Eq. 239, 243.

(4) Ibid. 10 Q. B. 459.

The reference to *Marshall* v. *Hill* (1) in the judgment of one of the learned Judges (2) is so compendious as may easily lead to a false impression of what was actually decided by Lord *Ellenborough.*

A *dictum* in *Bryden* v. *Willett* (3) was disapproved by Vice-Chancellor *James* in *In re Watson's Trusts* (4).

BACON, V.C. :—

In all these cases the difficulty which is cast upon the Court is very considerable, and it has always been felt to be so. The Court has always struggled as well as it could to get over such like difficulties, and whenever ambiguous expressions come under discussion, what can any Court do but look first of all to the way in which such words have been regarded—to consider former decisions —to endeavour to find out, if it can, a rule, and if a rule be ascertained, to follow that rule, and in the course of the inquiry to ascertain what may reasonably be held to be the policy of the law?

Those materials and those means I have now before me. The plain and unquestionable principle of the Court is, that a gift once vested cannot be divested without the plainest possible words—without the clear conviction that it was the intention of the testator that that vested interest should be divested. Words cannot be plainer than the words in this will. It is a gift to the daughter for life, and after her death to her daughter—the testator's granddaughter "*Alice White,* the only daughter of and child of the said *Sarah Maria White.*" It is impossible to read words which more plainly and distinctly express a positive substantial vested interest.

But those are not the only words which I have to consider. Then comes: "But in case the said *Alice White,* my granddaughter, shall happen to depart this life before the decease of her mother, or after her decease without leaving any issue." Those are the words upon which the doubt in the present case arises. Keeping in view the principle which I have mentioned, that a vested interest is not to be divested by any guess or any ambiguous expression, then I come to consider what this ambiguous expression "without leaving any issue" has been held to mean before. In the judgments of Lord *Ellenborough* and Mr. Justice *Bailey*, both those eminent Judges, without any kind of hesitation, came to the conclusion, under such circumstances, that you must read "without leaving" as "without having had" any issue.

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(1) 2 M. & S. 608.

(2) Law Rep. 10 Q. B. 464.

(3) Law Rep. 7 Eq. 472.

(4) Ibid. 10 Eq. 36, 39.

The other cases which have been referred to relate rather to the first principle I mentioned, that of the vesting of interests.

The cases of *Casamajor* v. *Strode* (1) and *In re Brown's Trust* (2), in which that principle is recognised, seem to me to dispose of the case. If the words had been "after his decease without leaving any children," it would certainly have been unreasonable to impute to the testator the meaning that if his granddaughter should have half-a-dozen children, and each of them half-a-dozen children, and all the former should happen to die in their mother's lifetime, none of the latter should get anything. But that would be the result of the contention that Mr. *Rigby* has raised before me. The policy of the law is plain. The words are ambiguous in a sense, but the ambiguity is cured by the decisions which have been referred to, and the law I take to be established that, in such a case as this, words ambiguous in themselves, following words which are subject to no ambiguity, but which confer a vested interest, have the effect contended for by Sir *Henry Jackson*, and the gift is a vested gift. Children having been born to the testator's granddaughter, her right has become indefeasible.

There will be a declaration as prayed by the petition.

The costs of all parties will come out of the estate.

Solicitors: *H. W. M. Jackson*; *Kingsford & Co.*

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(1) 8 Jur. 14.

(2) Law Rep. 16 Eq. 239.

In re GENERAL WORKS COMPANY.

V.-C. B.
1879
July 31.

GILL'S CASE.

Winding-up—Contributory Creditor—Right of Set-off—Judicature Act, 1875 (38 & 39 *Vict.* c. 77), s. 10.

Post 823.

The rule that a contributory cannot set off a judgment debt due to him from the company against calls made upon him by the official liquidator in the winding-up of the company, has not been affected by the *Judicature Act*, 1875, s. 10, which provides that in a winding-up the same rules shall apply as are in force in bankruptcy.

ADJOURNED SUMMONS on an application on behalf of the official liquidator of the *General Works Company, Limited,* to enforce payment by Mr. *Gill,* a shareholder, of a call made in the winding-up of the company. Mr. *Gill* claimed the right to set off against the call a debt due to him from the company in respect of which he had recovered judgment before the winding-up order.

Mr. *Gill* had been placed on the list of contributories in respect of four £100 shares on which £180 had been paid before they were transferred to him, leaving his liability under the call £220.

On the 12th of March, 1879, *Gill* had recovered judgment against the company for £501.

The petition was presented on the 28th of February, 1879, and on the 29th of March, 1879, the company was ordered to be wound up.

A call of £25 per share having been made by the official liquidator, *Gill* claimed the right to set off his debt of £501, and to prove under the winding-up for the balance.

Sir *H. Jackson,* Q.C., and *Grosvenor Woods,* for the official liquidator :—

A contributory has no right to set off a debt due to him from the company against calls made on him by the liquidator : *Grissell's Case* (1); *Black & Co.'s Case* (2). The right of set-off arises in respect of mutual debts only, but here there is no mutual debt, as a call is not a debt due to the company, but a statutory liability

(1) Law Rep. 1 Ch. 528.

(2) Law Rep. 8 Ch. 254.

to contribute to the assets of the company, to be enforced by the liquidator: *In re Whitehouse & Co.* (1); *Branwhite's Case* (before Mr. Justice Fry on the 2nd of May, 1879); and the effect of sect. 10 of the *Judicature Act*, 1875, which will be relied on, is not to make the whole of the rules of bankruptcy applicable to a winding-up, so as to convert that which is a statutory liability into an ordinary debt: *In re Albion Steel and Wire Company* (2).

Chester, for Mr. *Gill*:—

Admitting to the fullest extent the authority of *Grissell's Case* (3) and *Black & Co.'s Case* (4), those cases were decided before the *Judicature Act*, 1875, and the question whether the old rule has not been abolished by sect. 10 of that Act has never yet been decided, the effect of sect. 10 not having been considered either in argument or in the judgments of *In re Whitehouse & Co.* and *Branwhite's Case*; and see *Buckley's* Companies Acts (5). Having regard to the language of sect. 10, which provides that "in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail, and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt"—the only interpretation that can be put upon the section is that under a winding-up the same right of set-off between the mutual liability of a company and its contributory must be allowed as in the case of an estate which is being administered in bankruptcy. If the contributory creditor had become bankrupt, his trustees would have been entitled to set off a debt due to him from the company against a demand for calls by the official liquidator, and to receive dividends on the balance of the debt: *In re Duckworth* (6); *Ex parte Strang* (7). In the converse case of a bankrupt company, *i.e.*, a company which is being wound up, the effect of the *Judicature Act*, 1875, s. 10, must be to give the right of set-off which before that Act did not exist as between a contributory creditor (who had not become bankrupt) and the company in liquidation.

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(1) 9 Ch. D. 595.
(2) 7 Ch. D. 547.
(3) Law Rep. 1 Ch. 528.
(4) Law Rep. 8 Ch. 254.
(5) 3rd Ed. p. 229.
(6) Law Rep. 2 Ch. 578.
(7) Law Rep. 5 Ch. 492.

BACON, V.C.:—

The argument for the Respondent depends entirely upon the construction of the *Judicature Act*, 1875, s. 10, which is plain enough in its terms. The first question is whether there is a mutual debt and credit between Mr. *Gill* and the company, or rather, I should say, between Mr. *Gill* and the official liquidator representing the interest of the company and creditors of the company. I do not hesitate to say that I do not consider that there is. Mr. *Gill's* debt is a statutory obligation springing from the contract to take shares. There is no sort of resemblance between the case of a bankrupt shareholder, as in *In re Duckworth* (1) and *Ex parte Strang* (2), and the present case. In the case of a bankrupt shareholder, when a company or its liquidator went to prove for their call, being at the same time indebted to the bankrupt, part of the bankrupt's estate would consist of the debt which the company owed, and therefore, before the liquidator could share with the other creditors, he must pay the company's debt, or allow it to be set off. There is no kind of analogy between such a case and this, for in a winding-up a totally different state of things exists. The law vests in the liquidator the control of all the assets of the company, and the assets of the company in this case consist of, amongst others, a sum which Mr. *Gill* undertook to contribute to the assets of the company, whatever might happen. Though he has become a creditor, he must permit the assets to be realized, including the calls on him. Even if he has obtained a judgment against the company, he cannot levy any execution under it so as to get at assets in the hands of the official liquidator. *In re Whitehouse & Co.* (3) was decided since the *Judicature Act*, 1875, s. 10, and though the Act was not expressly referred to, it must have been present to the mind of the Master of the Rolls, who pronounced that decision, and I do

(1) Law Rep. 2 Ch. 578.

(2) Law Rep. 5 Ch. 492.

(3) 9 Ch. D. 595.

V.-C. B.
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GILL'S CASE.

not think any inference can be drawn in favour of the Respondent from the fact that there is no express reference to this section. The relation of debtor and creditor does not here exist. Mr. *Gill* is nothing better than a partner in a concern which has become insolvent, and if I were to adopt his contention, the result would be to allow one creditor only to recover 20*s*. in the pound, while all the other creditors had to be satisfied with little or nothing. The rights of the parties are decided by many cases on clear, unmistakable principles, and I should say that the point was really unarguable when regard is had to the difference between the case of a man who takes shares in an insolvent company, and of a man who becomes bankrupt, when there are truly mutual debts. In my opinion the case is clear, and my opinion is founded not only on the decisions, but on the principle, which is the essence of those decisions, and against which I find nothing antagonistic in the *Judicature Act*. I must therefore allow this summons, and as it is an experiment on the part of the Respondent, he must, I think, pay the costs of it.

Solicitors: *Snell & Greenip; T. & H. R. Gill.*

V.-C. B.
1879
Aug. 2.

RUTTER *v.* TREGENT.

[1879 R. 142.]

Pleading—Admission—Motion for Judgment—Rules of Court, 1875, *Order* XIX., *rr.* 17, 20, 22; XL., *r.* 11.

LD 395
LD 574
BD 651
BD 171

Unless the allegations in a statement of claim are specifically denied the Plaintiff is entitled to move for judgment as upon an admission of fact in the pleadings.

FORECLOSURE ACTION by the assignee of a mortgage against the mortgagor and subsequent incumbrancers.

The statement of claim stated (paragraphs 1, 2, and 3) the original mortgage and the assignment by the mortgagees to the Plaintiff, in which the mortgagor had joined; (paragraphs 4 and 5) the charges created by the mortgagor subsequent to the assignment to the Plaintiff of the first mortgage; and (paragraph 6) the amount of principal money with an arrear of interest now due to the Plaintiff.

By their statement of defence the Defendants stated that they did not admit the correctness of the statements set forth in paragraphs 1, 2, 3, and 6 of the Plaintiff's statement of claim, and required proof thereof. Defendant, the mortgagor, admitted that the subsequent charges were made as stated in paragraphs 4 and 5 of the statement of claim.

H. M. Sladen moved for judgment as upon admission of fact in the pleadings. Under Rules of Court, 1875, Order XIX., rules 17, 20, and 22, every fact must be specifically denied, and a mere statement that the Defendants require proof of the several allegations in the statement of claim is equivalent to an admission of the facts alleged so as to entitle the Plaintiff to judgment without further evidence: *Harris* v. *Gamble* (1).

Whitehorne, for the Defendants:—

This is an attempt, under Order XL., rule 11, to obtain a foreclosure order upon imaginary admissions. We do not admit the truth of the several allegations contained in the statement of claim relating to the Plaintiff's title and the amount which he claims, and call upon him formally to prove his title.

BACON, V.C., held that in the face of the Orders which introduced a new rule of practice, and must be strictly followed, there had been no sufficient denial of the facts alleged by the Plaintiff. The Defendants did not admit the correctness of the statements contained in the statement of claim, but they ought to state in what respect they disputed them. As in *Harris* v. *Gamble*, the allegations of fact contained in the statement of claim must, as against the Defendants, be taken to have been admitted, and the Plaintiff was entitled to judgment for foreclosure.

Whitehorne asked for and obtained leave to amend upon payment of the costs of the application.

Solicitors: *Alfred Rutter; Kisch, Son, & Hanbury.*

(1) 7 Ch. D. 877.

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[1868 P. 22.]

Sale of Annuity—Policy of Assurance effected by Grantee of Annuity—Mortgagor and Mortgagee—Right to Policy Moneys.

The grant of an annuity with a right of repurchase on payment of the consideration money and all arrears of the annuity, does not create the relation of debtor and creditor so as to give the grantor, upon repurchase of the annuity, the right to a policy effected by the grantee on the life of the grantor as a security or indemnity; or, after the death of the grantor, to entitle his representatives to the surplus proceeds of the policy after satisfaction of the consideration money and all arrears of the annuity.

In 1822, in consideration of £600, *A.*, and *B.* his wife, granted to *C.* an annuity of £64 7*s.* 6*d.* for ninety-nine years, if *B.* should so long live. By the same deed the rents of copyhold property to which *B.* was entitled, were granted during her life to *C.*, with a covenant to surrender from and after *B.'s* death to the use of *C.*, and power to *C.* to sell in case the annuity should be in arrear. The deed contained provisions that any extra premiums to become payable at the office where *B.*'s life should be insured, should be paid by *A.*, and a power to *A.* to repurchase the annuity at any time after three years on payment to *C.* of £600 and all arrears of the annuity. On the day before the date of the deed by which the annuity was granted, *C.* insured *B.*'s life for £600, at an annual premium of £16 7*s.* 6*d.*

The copyholds were surrendered, and *C.*, by himself or his representatives since his death, had been in possession since 1828.

A. died in 1858, and *B.* in 1869:—

Held, as between the representatives of *C.* and *B.*, that the surplus proceeds of the policy effected by *C.* on *B.'s* life, after satisfaction of the £600 and all arrears of the annuity, belonged to the representatives of *C.* and not of *B.*

Gottlieb v. *Cranch* (1) and *Knox* v. *Turner* (2) followed.

Lea v. *Hinton* (3), *Drysdale* v. *Piggott* (4), *Courtenay* v. *Wright* (5), discussed.

IN March, 1822, *Sarah Preston*, and *Edward Preston* her husband in her right, being entitled to a life interest, with a power of appointment over the reversion, in six copyhold cottages at *Hornsey*, entered into negotiations with *Samuel Neele* for the sale to him of an annuity, which was carried out by the following transaction:—

On the 19th of March, 1822, *S. J. Neele* effected a policy of insurance for £600 in the *Provident Life Insurance Office* on the life of *Sarah Preston* at an annual premium of £16 17*s.* 6*d.* By deed of the 20th of March, 1822, between Mr. and Mrs. *Preston* of the one part and *S. J. Neele* of the other part, after reciting the title of Mrs. *Preston,* a contract for the sale to *Neele* of an annuity, and an agreement by Mrs. *Preston* to assign her present and future interest to *Neele, Edward Preston,* in consideration of £600, granted to *S. J. Neele,* his executors, administrators, and assigns, an annuity of £64 7*s.* 6*d.*, payable during the term of ninety-nine years if Mrs. *Preston* should so long live. By the same deed Mrs. *Preston* granted the rents, issues, and profits of the copyhold premises to *Neele,* his executors, administrators, and assigns, during her life, upon trust to retain and pay the said annuity thereout, and all costs, charges, and expenses sustained by reason of the non-payment thereof and of such premiums of assurance as thereinafter mentioned, and subject thereto to pay, account for, and dispose of the residue unto Mrs. *Preston* as she should direct or appoint, for her sole and separate use. The deed contained covenants by *Edward Preston* that he and his wife would surrender the premises to the use, from and after her death, of *S. J. Neele,* his heirs and assigns, upon trust, in case the annuity should be in arrear, to sell the premises and stand possessed of the proceeds of such sale upon the trusts therein contained; that Mrs. *Preston* would not during the continuance of the annuity go beyond the seas without giving notice in writing to *Neele,* for the purpose of enabling him to make known the same at the office where the life of Mrs. *Preston* should be insured, in order that the additional premiums of insurance to become payable by reason thereof might be paid, to prevent any loss happening to *Neele* by reason of her so going beyond the seas, all which said premiums thereby to be incurred should not be on any greater sum than £600; and also that *E. Preston* would pay any such additional premiums, with interest at 5 per cent. It was also provided, that in case *E. Preston,* his heirs, executors, or administrators, should, at any time after the expiration of three years from the date thereof, wish to repurchase the said annuity, and give three months' notice in writing thereof to *Neele,* his executors, administrators, or assigns, and pay to *Neele,* his executors, &c., the full sum of £600, together with all arrears of the said annuity, and proportionable part thereof up to the day of repurchase, and also all costs, charges, and expenses incurred or occasioned by the non-payment thereof, or in the execution or performance of the trusts aforesaid or relating thereto—then and in such case *Neele*, his heirs, executors, and administrators, should, at the request, costs, and charges of the said *E. Preston*, his heirs, executors, and administrators, acknowledge or cause satisfaction to be acknowledged for the record of the judgment to be entered up by virtue of the warrant of attorney, and then and in such case the said annuity and the powers and remedies thereby given for recovering and enforcing payment thereof, should from thenceforth be extinguished, and the hereditaments thereby assigned should be reassigned and surrendered in such manner as *Edward Preston* should direct.

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(1) 4 D. M. & G. 440. 17 Jur 704
(2) Law Rep. 5 Ch. 515.
(3) 5 D. M. & G. 823.
(4) 8 D. M. & G. 546. 2 Jur NS 107
(5) 2 Giff. 337. 6 Jur NS 1283

The reversion or remainder expectant on the death of *Sarah Preston* in the copyhold premises was on the same 20th of March, 1822, surrendered by *Edward* and *Sarah Preston* to the use of *S. J. Neele*, his heirs and assigns, according to the custom of the manor.

S. J. Neele, the grantee of the annuity, died in 1824, and shortly afterwards *George Neele*, his executor, entered into possession of the mortgaged premises, and since that period the persons successively entitled to the annuity, including the Defendants, had been in possession, and in receipt of the rents and profits which, as the bill alleged, were more than sufficient to pay and keep down the arrears of the annuity.

Edward Preston died in 1858, and *Sarah Preston*, his widow, in January, 1868, filed a bill against the persons then representing the estate of *S. J. Neele* for an account of what was due in respect of the annuity, and for accounts against the Defendants, as mortgagees in possession of the property mortgaged as a security for the annuity, on the footing of wilful default.

Sarah Preston died in January, 1869, and thereupon the sum of £1138 14*s*. 8*d*. was received by the Defendant *Josiah Neele* under the policy of assurance of the 19th of March, 1822, in respect of the sum of £600, and bonuses thereon. The original suit was revived by the present Plaintiff, *Edward Preston* the son, and administrator with the will annexed, of *Sarah Preston;* and in 1877 he filed a reamended bill, claiming the same relief as that which was sought by the original bill of *Sarah Preston* and substituting as Defendants the present representatives of *S. J. Neele*, the grantee of the annuity, for the former Defendants. By the reamended bill the Plaintiff also prayed an account of all sums paid in respect of the policy of assurance of the 19th of March, 1822, and of all reductions that were or would have been made in such premiums if the bonus had been so applied, and that the estates of the deceased representatives of *S. J. Neele* might be charged with repayment to the Plaintiff of the amounts paid for on premiums beyond the amounts to which the premiums would have been reduced by bonus; and also an account of all sums received under the policy of assurance, and payment to the Plaintiff of what should appear due to him in respect thereof.

The question argued was whether the proceeds of the policy of insurance effected by *S. J. Neele* upon the life of *Sarah Preston* formed part of his personal estate, to which the Defendants, as his personal representatives, were entitled; or whether the proceeds, after deducting all arrears due in respect of the annuity, which had ceased to be payable, and the £600, the consideration paid for the purchase of the annuity, belonged to the Plaintiff as personal representative of *Sarah Preston.*

Sir *H. Jackson*, Q.C., and *Willis Bund,* for the Plaintiff:—

Subject to payment of all arrears due in respect of the annuity, and of the £600 consideration money for the annuity, the Plaintiff, as legal personal representative of *Sarah Preston,* claims to be entitled to the surplus proceeds of the policy effected by *S. J. Neele* on her life. That policy was effected by *Neele,* not for his own independent benefit, but,—as shewn by the nature of the transaction, by the provisions in the subsequent deed of the 20th of March, 1822, for payment of any additional premiums by *E. Preston,* and by the fact that the premiums and the interest of the £600 were just covered by the annuity,—as a security for repayment of the £600; the whole transaction being one of mortgage or loan, in which Mrs. *Preston* joined as a surety for her husband's debt. The tendency of the Court is to treat annuities

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granted, as in this case, with a power of repurchase as redeemable annuities, "and endeavours if possible to bring them to be cases of redemption": *Longuet* v. *Scawen* (1); and to treat such a transaction as one of "a loan of money, turned into this shape only to avoid the *Statute of Usury*": *Lawley* v. *Hooper* (2); *Bulwer* v. *Astley* (3); *Fisher* on Mortgages (4). There is no trace of any general rule that when the grantee of an annuity, by way of additional security, insures the life of the grantor, the proceeds of the policy on redemption of the annuity belong to the insurer. Where, as in this case, the relation of debtor and creditor subsists, and the true construction of the instruments, and the evidence thereby afforded of the real nature of the transaction, shew that the policy of assurance was effected by the creditor as a security or indemnity, if the debtor directly or indirectly provides money to defray the expense of that security he is entitled to have the security delivered up to him when he pays the debt, which it was directly or indirectly at his expense effected to secure: *Courtenay* v. *Wright* (5); *Lea* v. *Hinton* (6); *Drysdale* v. *Piggott* (7); and where, as in this case, the policy moneys have been received, to the surplus after satisfying the debt thereby secured: *Ex parte Andrews* (8). In this case, although the premiums may have been physically paid by *Neele*, they were provided for by the annuity of £64 7*s*. 6*d*., which after payment of £48, or interest at 8 per cent. upon the sum of £600, left the exact amount of annual premium £16 7*s*. 6*d*., and were thus in reality paid by the debtor. In *Knox* v. *Turner* (9) Vice-Chancellor *Stuart* following, though with much reluctance, *Gottlieb* v. *Cranch* (10), dismissed the bill of the grantor of the annuity for an assignment of the policy on repurchasing the annuity, and the decision was affirmed (11), on the ground that the transaction was one of purchase of a redeemable annuity, and not an advance as a loan. We submit, however, that this case is distinguishable, and is governed by the principles stated in *Courtenay* v. *Wright* and that, as between the representatives of *S. J. Neele* and of Mrs. *Preston*, the surplus policy moneys form part of her estate.

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(1) 1 Ves. Sen. 402.

(2) 3 Atk. 278.

(3) 1 Ph. 422, 434.

(4) 3rd Ed. p. 20.

(5) 2 Giff. 337. 6 Jur NS 1153

(6) 5 D. M. & G. 823.

(7) 8 D. M. & G. 546. 2 Jur NS. 1

(8) 1 Madd. 573.

(9) Law Rep. 9 Eq. 155.

(10) 4 D. M. & G. 440 17 Jur 704

(11) Law Rep. 5 Ch. 515.

Rigby (*North*, Q.C., with him), for the Defendants:—

It has been attempted on behalf of the Plaintiff to shew that the transaction of March, 1822, was one of debtor and creditor, and not what it purports to be, the purchase of a redeemable annuity. In *Lawley* v. *Hooper* (1) and *Bulwer* v. *Astley* (2) it was held that the real nature of the transaction was one of loan, the words redemption and repurchase being used synonymously, and the particular form of security having been adopted to evade the usury laws then in force. As a general rule, where the grantee of an annuity insures the life of the grantor, the policy, in the absence of any contract that it shall become the property of the grantor on redemption of the annuity, belongs to the grantee, even though the annuity is calculated to cover extra premiums for residence abroad: *Gottlieb* v. *Cranch* (3); *Freme* v. *Brade* (4); *Knox* v. *Turner* (5). Even assuming that by the terms of the contract, express or implied, the grantor became entitled, upon redeeming the annuity, to have the policy delivered up to him, such a contract must be construed strictly, and will be limited to the occurrence of the event on which alone the right arose, *i.e.*, redemption of the annuity. But as the annuity has not been, and cannot now be, redeemed, the Plaintiff is not entitled to the surplus proceeds of the policy: *Bashford* v. *Cann* (6). *Ex parte Andrews* (7) was decided on totally different grounds, viz., that the creditors, to whom as trustees the wife's contingent interest had been assigned by husband and wife, could not claim the surplus proceeds of an insurance effected by them, on the principle that a trustee cannot deal with the trust estate for his own benefit. As upon the death of Mrs. *Preston* the annuity would terminate, *Neele* had an insurable interest in her life: *Henson* v. *Blackwell* (8). In the event of the grantor's bankruptcy, he would have been admitted to prove for the full value

(1) 3 Atk. 281.
(2) 1 Ph. 422.
(3) 4 D. M. & G. 440. 17 Jur 704
(4) 2 De G. & J. 582. 4 Jur NS 746
(5) Law Rep. 5 Ch. 515.
(6) 33 Beav. 109.
(7) 1 Madd. 573.
(8) 4 Hare, 434.

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of the annuity without giving up the policy: *Ex parte Varnish* (1); and is entitled to the proceeds as his own property: *Ex parte Lancaster* (2). The cases relied on by the Plaintiff were all debtor and creditor cases, where, the insurance having been effected as a security or indemnity, the policy, or the balance of the proceeds after satisfaction of the debt, became the property of the debtor. But this is the simple case of the sale of an annuity, with power of repurchase; and according to *Gottlieb* v. *Cranch* (3) and *Knox* v. *Turner* (4), the Defendants as representatives of *Neele* are entitled to the surplus proceeds of the policy which was effected by him.

Sir *H. Jackson*, in reply.

BACON, V.C.:—

The principal question—it may be said the only important question which has been argued in this case—is whether or not the proceeds of a policy of insurance effected by the grantee of an annuity form part of his personal estate, or whether, the annuity having ceased to be payable, such proceeds, after deducting all sums which had become due in respect of the annuity, and the amount of the consideration paid for the purchase of the annuity, belong to the personal representatives of a person who had joined in the grant of the annuity by way of surety only. The main facts of the case do not differ materially from those which ordinarily occur in annuity transactions. [After stating them his Lordship continued:—]

Now in this state of things it has been insisted on the part of the Plaintiff that he is entitled, as the legal personal representative of the original Plaintiff, to have the policy of insurance on his life treated as a security held by the grantee for the payment of the annuity; and that the annuity, with all arrears, if such there be, being satisfied, he is entitled, *Sarah Preston* having been a surety only, to repurchase or redeem the annuity, and to have all the securities held by the grantee transferred to him—that is to say, that he is entitled to have the proceeds of the policy brought

(1) 1 M. D. & D. 514.
(2) 4 De G. & Sm. 524.
(3) 4 D. M. & G. 440. 17 Jur 704
(4) Law Rep. 5 Ch. 515.

into the account of all that has been, or, but for their wilful default, might have been, received by the grantee and his successors; and, deducting from the amount all that became due in respect of the annuity, and the sum of £600 originally paid by the grantee, to have the surplus paid to him the Plaintiff. And for that purpose reliance has been placed upon the principle that the deed of grant containing a clause of repurchase or redemption, the transaction must be considered as a loan, and not, as it purports to be, an absolute sale of an annuity. In support of this assertion reference is made to a *dictum* of Lord *Hardwicke* in *Lawley* v. *Hooper* (1), in which it was so held. In considering that decision, which (although it has been described by the Defendant's counsel, somewhat irreverently, as being musty) I treat as of unquestionable authority, regard must be had to the actual substance of the case. It was decided at a time when the rigour of the laws against usury had induced the Courts to go to all legitimate lengths for the purpose of checking the devices by which dealers in loans had proved themselves too strong for the law. The necessities of borrowers and the greed of dealers in money had led to the invention of lending upon annuity, the principal feature of which was that the lender, having no means of compelling the repayment of the money lent, was not subject to the heavy penalty imposed by the statute upon usurious dealing —a contrivance which had proved practically successful, but which the Courts found themselves bound to discountenance and thwart. In the case before Lord *Hardwicke* a spendthrift youth, less than twenty-two years of age, penniless, and in prison, had been induced, under the pressure of his necessities, to grant an annuity of £150 per annum at what, in the eye of the law as it then stood, was thought to be an odious and unlawful rate of usury, in consideration of a present advance of £1050, by which he was enabled to procure his release from gaol. Upon considering all the circumstances, the provisions of the deed, and especially the stipulation that if any repurchase of the annuity should be made, the grantor should pay him a bonus over and beyond the annuity, the Lord Chancellor was able to come to the conclusion that the transaction was a loan, and was not protected by the mere form in which the security had been taken; and he accordingly decreed that the Plaintiff was entitled to redeem the annuity upon payment of the £1050, with interest from the date of the deed in 1737 (the decree being in 1745), and of all such sums as had been paid by the grantee for insurance of the grantor's life, with ordinary legal interest. This is, I believe, the only case in which any annuity transaction has been thus dealt with; and unless it proceeded upon the ground that a fraudulent advantage had been taken of the grantor's youth and indiscretion and necessities (which there is reason, from the terms of the Lord Chancellor's judgment, to believe it did), it seems difficult to reconcile it with any of the principles applicable to contracts not prohibited by the law. Grants of annuities are perfectly lawful in themselves, and there have been many cases in which the right to repurchase or redeem them has been decreed; but the Court of Equity has never, so far as I know, turned a grant of an annuity, untainted by fraud, into a simple loan of money repayable with simple interest. And in the present case there is no suggestion of fraud or of advantage taken of the grantor. The case before Lord *Hardwicke* was referred to in a more recent case, which has been cited in favour of the Plaintiff's contention—*Bulwer* v. *Astley* (1)—in which Lord *Lyndhurst* noticed the effect of a power of repurchase or redemption as decided by Lord *Hardwicke*, but he did so for a different purpose and under very different circumstances. The owner of large estates had raised money by means of rent-charges, the grants of which contained powers of repurchase and redemption by the borrower. By his will he had directed the payment of all his debts out of his personal estate and by other means, and, subject thereto, he disposed of the rest of his estate in such a manner as that the Plaintiff in the suit was then tenant for life. The question there raised was, whether the tenant for life was bound to pay the annuities or rent-charges, or whether the power to repurchase ought not to be exercised by means of the personal estate and such other means as were applicable under the will for that purpose. Lord *Lyndhurst* then held that the sums which had been advanced to the testator were to be considered as debts of his which ought to be paid (treating "repurchase" and "redemption" as being synonymous) in compliance with the directions of the will, and that the original decree ought to have directed the annuities to be valued, and that the tenant for life was bound only to keep down the interest of the estimated value. None of the annuitants were parties to the suit, and could not be in any degree affected by the decision, nor is there in the judgment any suggestion of a principle upon which the value of the annuities was to be estimated. Neither of these decisions appears to me to have any direct application to the case before me, for not only is there no impeachment of the original grant of the annuity, but there can be no repurchase or redemption of the annuity granted in 1822, and subsisting till 1869, when it ceased, since the original Plaintiff claimed no such right, nor did she in any manner mention or allude to any right of repurchase. It has, however, been insisted that, inasmuch as the annuity included the sum requisite to provide for the insurance on her life (as I have no doubt it did, although it is not so expressed), and as the rents of the mortgaged premises were the separate estate of *Sarah Preston*, it must be concluded that the annual premiums were paid with her moneys; and that, as the additional premiums, if any such arose, were charged upon the same premises, she must in all cases be regarded as a surety only, and therefore entitled, upon the annuity being satisfied, to have the benefit of all the securities held by the grantee. The annuity, and the moneys received by the grantee under it, were his money when he received it. He was under no obligation to insure. He might have dropped the insurance, or he might have sold or surrendered the policy whenever he thought fit. For these reasons, as well as upon the facts stated in the answer and deposed to, I do not think it can be said that any person other than the grantee was at any time entitled to the policy. And this being so, I find it impossible to conclude that the original Plaintiff could when alive, or her representative, the present Plaintiff, can now, establish any right to the policy on the ground that it was a security to the transfer of which *Sarah Preston*, surety though she was, could in any sense be held to be entitled.

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(1) 3 Atk. 280.

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(1) 1 Ph. 422.

There have been several cases in which the title to policies of insurance effected by way of security have come under consideration, some of which have been referred to in the argument, but none of which appear to me to favour the Plaintiff's contention. In *Lea* v. *Hinton* (1), the Defendant as surety and creditor effected an insurance for the purpose of indemnifying himself, and received a larger sum on the policy than was necessary for those purposes. It was there held that he was not entitled to retain more than was sufficient to repay him, and that the surplus belonged to the estate of the debtor against whom he had charged all that he had paid. In *Drysdale* v. *Piggott* (2) a similar decision was made, although there all the premiums had been paid by the creditor who had insured, and notwithstanding that the debtor had refused to pay the premiums when required to do so; and *Courtenay* v. *Wright* (3) is to the like effect. But in all these cases the relation of debtor and creditor was indisputable, and the ground of the decisions was that the insurance being only to secure the debt, the creditor had no interest after the debt was paid. In this case it appears to me impossible to say that the relation of debtor and creditor at any time subsisted between the parties to the deed by which the annuity was secured, and therefore impossible to say that the cases referred to in any degree support the Plaintiff's contention. The case of *Gottlieb* v. *Cranch* (4), often referred to, and, as I conceive, never questioned, explains and establishes the principles applicable to cases like the present. And although in the more recent case of *Knox* v. *Turner* (5) Vice-Chancellor *Stuart* expressed considerable doubt as to the grounds upon which some of the preceding decisions had been arrived at, yet, feeling himself bound by those decisions, he dismissed the bill of a Plaintiff who, under circumstances not distinguishable from the present, except that he had repurchased an annuity which the grantee had protected by effecting an insurance, sought to compel the grantee to transfer to him the policy. The Vice-Chancellor in his judgment so expressed himself as to encourage an appeal; an appeal was brought, and being heard before Lord *Hatherley* (6), was by him unhesitatingly dismissed. It must, I think, therefore be considered as fully established upon authority that a grant of an annuity like that in the present case is a transaction perfectly lawful and perfectly plain; that whatever be the right of repurchase, no relation

(1) 5 D. M. & G. 823.
(2) 8 D. M. & G. 546. 2 Jur NS 1078
(3) 2 Giff. 337. 6 Jur NS 1285
(4) 4 D. M. & G. 440. 17 Jur 704
(5) Law Rep. 9 Eq. 155.
(6) Ibid. 5 Ch. 515.

of debtor and creditor is thereby created; that the indemnity which the grantee thinks fit to make for himself does not constitute a security in which the grantor has any right or interest; and that the claim of the Plaintiff to have the proceeds of the policy brought into the account as if the original Plaintiff could have claimed any interest in it, wholly fails. That she did not claim any such interest I have already stated; that she did not insist on repurchasing is apparent. And even if she had possessed any such right to repurchase as is alleged, it must, to have been effectual, have been asserted in her lifetime, while there was existing some subject capable of being repurchased: *Bashford* v. *Cann* (1).

I think, therefore, that so much of the bill as seeks to have the benefit of the proceeds of the policy must be dismissed with costs; but at the suggestion of the Defendants I direct that these costs be credited to them in the account to be taken. In other respects there will be a direction for the usual accounts of the rents and profits received by the Defendants and their predecessors of the mortgaged estate in the ordinary form against a mortgagee in possession; and further consideration and subsequent costs must be reserved.

Solicitors: *Dain; W. T. Elliott.*

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[1879 G. 96.]

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1879
Aug. 1.

Practice—Rules of Court, 1875, *Order* xv., *r.* 1—*Preliminary Accounts—Further Consideration.*

When an order for preliminary accounts is obtained under Rules of Court, 1875, Order xv., rule 1, after issuing the writ of summons in a forclosure action, and after simple appearance to the writ by the Defendant, the order should not prejudice the trial of any issues which might be raised by the pleadings subsequently delivered by inserting as of common form the words "and the Judge not requiring any trial of this action other than this application."

ADJOURNED SUMMONS on behalf of the Defendants to vary the Chief Clerk's certificate.

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(1) 33 Beav. 109.

The Plaintiffs, who were mortgagees of property including the *Adelphi Theatre*, commenced a foreclosure action, the writ of summons in which was issued on the 22nd of March, 1879. The Defendants appeared to the writ, and the Plaintiffs, on the 8th of April, 1879, before delivering their statement of claim, obtained, upon summons in Chambers under Order xv., an order that an account be taken of what was due to them for principal and interest under certain indentures of mortgage and transfer of mortgage dated, &c., " And the Judge not requiring any trial of this action other than the hearing of this application, the further consideration of this action is adjourned and the parties are to be at liberty to apply as they may be advised."

On the 18th of April the Plaintiffs delivered their statement of claim, and on the 10th of May, 1879, the Defendants delivered their statement of defence, in which they alleged that "the Plaintiffs or some or one of them have been in occupation of the mortgaged premises and are liable to account as mortgagees in possession for rents and profits, or at all events for occupation rent. On the 31st of May the Plaintiffs replied joining issue.

By these pleadings the liability of the Plaintiffs as mortgagees in possession to account to the Defendants for the rents and profits of the property and for an occupation rent was distinctly put in issue.

On the 5th of July, 1879, the Chief Clerk made his certificate, giving the result of the accounts directed to be taken by the order of the 8th of April, 1879, and disallowing a sum of £4917 16*s.* 2*d.*, which the Defendants sought to charge the Plaintiffs with as occupation rent.

On the 21st of July, 1879 (after the expiration of the time limited for applying to vary the certificate), the Defendants took out a summons to vary the certificate by disallowing a claim to sums allowed to the Plaintiffs for insurance premiums and interest thereon, and by allowing the Defendants the sum of £4917 16*s.* 2*d.* as occupation rent of the *Adelphi Theatre*.

The Plaintiffs having waived the objection as to these, the summons to vary came on to be heard with the further consideration of the action.

The question raised was whether after the order of the 8th of April, 1879, and the certificate made in pursuance thereof, it was open to the Defendants to defend the action upon the merits and bring forward the case raised by their pleadings.

Hemming, Q.C., and *E. B. Michell*, for the Defendants, in support of the summons:—

We admit that this summons is open to a technical objection, but it was taken out as the only course open to us for the purpose of bringing our case fairly before the Court. The mischief was done by the order of the 8th of April, 1879. We have a good defence, and ought not to be precluded by the form of the order, or by the Chief Clerk's certificate, from trying the action on the merits. The words "the Judge not requiring any trial of this action other than the hearing of this application" were wrongly inserted in the order of the 8th of April, 1879, and are applicable only to the common order for accounts where the Defendant has made default in appearance, and no pleadings are necessary.

Sir *H. Jackson*, Q.C., and *Crossley*, for the Plaintiffs.

BACON, V.C.:—

The order that has been made was asked for by the indorsement of the writ as issued, and that that was reasonable is not disputed. The Plaintiffs were mortgagees, and therefore the Chief Clerk, or perhaps I should rather say I myself in Chambers, thought it right that under Order xv., rule 1, there should be this preliminary account taken. The insertion into the order of the 8th of April, 1879, of these words, "the Judge not requiring any trial of this action other than the hearing of this application, the further consideration of this action is adjourned," seem to have given rise to the difficulty; and I regret to find that these words were tacked on to the order. At the time that order was made no pleadings had been delivered; there was merely the indorsement on the writ, and I suppose an affidavit, and then for the purpose of taking the preliminary accounts, no other trial was necessary or required. After this order was made the Plaintiffs deliver a statement of claim, and the Defendants deliver a statement of defence by which distinct issues are raised as to whether the Plaintiffs were mortgagees in possession, or liable to an occupation rent, and so on; and in that state the issues remain down to the present time. The Chief Clerk's certificate also remains unchallenged. Now the further consideration comes on, and the Defendants by their summons seek in effect to raise certain issues though in point of form it seeks to vary the certificate. It is impossible for me to accede to such an application, but the issues must be heard and decided between the parties. The preliminary account has been taken, and no suggestion is made that less than the capital sum and interest found by the certificate is due on these mortgages. I see no ground to vary the certificate, and therefore must dismiss the summons, and with costs. With reference to the further consideration, I think that must be postponed, as I cannot allow the preliminary account to prejudice the Defendants in having the issues raised by the subsequent pleadings properly heard and determined. Either party will be at liberty to proceed at once to evidence on the issues raised by the pleadings, and the action will be set down for trial in the Michaelmas Sittings.

Order XV., rule 1, is most useful. Many matters are often settled under that order without the action going any further, or being ever heard, and that was the intention of the Legislature. I must say that the words in the form given in *Seton* (1), "The Judge not requiring any trial of this action other than the hearing of this application," are not adapted to a case like the present. These words should not be used indiscriminately so as to prejudice any issues that may be raised by the subsequent pleadings.

Solicitors: *W. M. Fladgate; Webster & Graham.*

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(1) 4th Ed. p. 8.

In re ROCHDALE PROPERTY AND GENERAL FINANCE COMPANY.

V.-C. B.
1879
Aug. 2.

Winding-up—Power to Official Liquidator to Act without previous Sanction or Interference of the Court.

Form of order under a compulsory winding-up giving the official liquidator power to do all acts required or authorized to be done without the previous sanction or interference of the Court.

PETITION for an order to wind up the *Rochdale Property and General Finance Company, Limited,* and for the appointment of an official liquidator.

Sir *H. Jackson,* Q.C., and *Whitehorne,* in support of the petition, which was not opposed, asked that the official liquidator might, as in *Re Elliott Brothers, Limited* (V.-C. M. 26th May, 1871, Reg. Lib. A. 1252), be empowered to do all necessary acts without the sanction or interference of the Court, thus giving the effect of a supervision order to a compulsory winding-up.

Hemming, Q.C., and *Somervell,* for the company, did not oppose.

The order following *Re Elliott Brothers* was made in this form :—

Let the said *Rochdale, &c., Company* be wound up by this Court under the provisions of the Companies Acts, 1862 and 1867. And the Judge doth hereby appoint —— official liquidator of the above-named company without giving security. And the Judge doth declare that all the acts required or authorized by the above statutes to be done by the official liquidator may be done by the official liquidator hereby appointed without the previous (1) sanction or interference of this Court.

Solicitors: *Clarke, Woodcock, & Ryland.*

(1) The word "previous," which was not contained in the order made in *Re Elliott,* was introduced by direction of the Vice-Chancellor.

V.-C. B.
1879
June 10, 11.

DASHWOOD *v.* JERMYN.

[1878 D. 141.]

Agreement to settle—Representation, Marriage on Faith of.

5 Ch D 365

An unattested paper signed by *A.* and by him handed to *B.* stated that as a mark of his esteem and great friendship he agreed to allow *B.* £500 a year, and that after his (*A.'s*) death he had in lieu thereof bequeathed to him £10,000.

B. took this document to *C.*, who thereupon consented to the marriage of her daughter with *B.*, such consent having hitherto been withheld on the ground of *B.'s* want of means.

The marriage took place, but no settlement was made by *B.* on his wife. *A.* died about six months after signing the paper, having paid *B.* the first quarter of the allowance of £500 a year. His will contained no provision whatever in favour of *B.*:—

Held, that assuming the consent of *C.* to her daughter's marriage with *B.* to have been given on the faith of the engagement contained in the paper, there was no such connection between *A.'s* promise or representation and the consent given by *C.* as to sustain a claim against *A.'s* estate.

THIS was an action by Captain and Mrs. *Dashwood* against the executors of the late *William Richards*, who died in October, 1874, for the purpose of establishing a claim against his estate for a sum of £10,000 under the following circumstances:—

The Plaintiff Captain *Dashwood*, who was formerly in the *East India Company's* service, after his return to this country on half-pay, in 1866, made the acquaintance of the testator, *William Richards*, at the *Portland Hotel*, where they were both staying. In 1872 Captain *Dashwood* was conditionally engaged to his cousin, Miss *Edith Marshall*, but having at that time little beyond his half-pay to depend upon, Mrs. *Marshall* refused to sanction the engagement until the Plaintiff had a sufficient income by getting an appointment or otherwise. According to the Plaintiff's account the testator, who was then on very intimate terms with him and took a great interest in his affairs, expressed great sympathy at the postponement of his marriage, and said he would do all he could to assist the Plaintiff in getting an appointment. Not succeeding in some attempts to get him an appointment in *Ceylon*, the testator, in a conversation with the Plaintiff on the

16th of February, 1874, promised to let the Plaintiff have £500 a year during his lifetime, and, as that allowance would cease when he (*Richards*) died, that he would make a will bequeathing the Plaintiff £10,000. The Plaintiff on the same day wrote to Miss *Marshall* a letter in which occurred the following passage:—"I have had a thundering long confab. with *Richards*. It is all serene about the £500 a year and £10,000 by will. The yearly allowance to be paid quarterly or half-yearly as I may wish. I will give you full details to-morrow." Mrs. *Marshall*, when informed the same or the next day of this promise on the part of Mr. *Richards* to give or settle on the Plaintiff £500 a year, provided she (Mrs. *Marshall*) would consent to the marriage, said that she must have something more tangible than merely a word or letters, some more positive proof, and she would then consent to the marriage, provided the money was given and settled. After calling once or twice without seeing him, the Plaintiff on the 10th of March saw *Richards* in his rooms in *Osnaburgh Street*. In his account of this interview in his evidence in Court, which was much more detailed than that given in answer to the Defendant's interrogatories, the Plaintiff stated: "I told him (*Richards*) that Mrs. *Marshall* was so anxious for documentary evidence of some kind as proof of what I had said, and he said, 'I cannot make out anything at present, I am not well enough to write out anything at present.' I said, 'What am I to do? I have been here two or three times.' He said, 'If you will sit down and write, I will dictate you. Would that do?' I said I supposed it would. He said, 'Then write,' and I wrote from his dictation, and after I had written I read it over to him. He said, 'That will do; let me see it.' I gave him the paper and he said, 'Now I will sign it.' I said, 'Shall I call Mrs. *Harper* (the landlady) or anybody to witness it?' but he said, 'No, no; I do not want anybody to know it; this is between ourselves.'"

The document thus signed by the testator and produced by the Plaintiff was as follows:—

"I, *William Richards*, as a mark of my esteem and of the great friendship I bear towards *A. A. G. Dashwood*, do hereby agree to allow him the sum of five hundred pounds annually, to be made in quarterly instalments of one hundred and twenty-five pounds.

And whereas at my death this allowance will cease to be paid, I have in lieu thereof bequeathed by will to him the aforesaid *A. A. G. Dashwood* the sum of £10,000 (ten thousand pounds), and in proof thereof do hereby affix my signature.

"*William Richards.*

"25 *Osnaburgh Street, Regent's Park, London,*
10th March, 1874."

Armed with this document, the Plaintiff at once went to Mrs. *Marshall* and obtained her unconditional consent to the marriage, which took place on the 19th of March, 1879, by license, which (dated the 7th of March, 1874) contained the usual statement on oath by the Plaintiff as the person obtaining it, that the consent of the father of Miss *Marshall* (then a minor) had been obtained. In reference to this statement, it was explained by Mrs. *Marshall* that her husband, who had been absent from *England* for some time, had given her full authority to act in the matter of their daughter's marriage, and that the result of the paper (of the 10th of March, 1874) being produced was that she consented to the marriage on behalf of her husband and herself; that it was on that promise and that document alone that she consented to the marriage, and that but for that document she would have stopped the marriage at the last moment. It was also stated by the Plaintiff Mrs. *Dashwood* that she would never have married without her mother's consent. No settlement was made upon the marriage. The discrepancy between the statement in the license of the 7th of March, 1874,—that the consent of the parents to the marriage had been obtained,—and the case put forward by the Plaintiffs both by their pleadings and in their evidence, that the consent to the marriage was not given until production of the document of the 10th of March, 1874, and but for such document the marriage would not have taken place, was not, however, explained.

On the 24th of March, 1874, the Plaintiff, according to his statement, received from *Richards* £125 in bank notes as the first quarter of the £500 a year allowance. In October of that year the testator died without having made any further payment in respect of the allowance.

No legacy of £10,000, or of any other sum, in favour of the

Plaintiff was contained in the testator's will (dated the 10th of April, 1867) or codicils (the last of which was dated the 5th of December, 1873.) The Plaintiff's case was that as his position had been changed, and the consent of his wife and her mother to the marriage had been obtained on the faith of the paper of the 10th of March, 1874, which was either a binding agreement or a representation of fact, and as the marriage would not otherwise have taken place, the estate of the testator was bound to make good such representation.

The executors by their statement of defence averred that the testator was a man of intemperate habits, incapable of managing his affairs, and had in effect died of *delirium tremens;* that his signature to the paper or agreement of the 10th of March, 1874, was not fairly or honestly obtained, and that the same was not binding in equity; that the agreement was void for want of consideration, and also under the *Statute of Frauds.* The allegations that the mother's consent to the marriage was obtained on the faith of such agreement were denied.

Bristowe, Q.C., and *T. A. Roberts*, for the Plaintiffs:—

We rest our case on the well-established principle that if a man makes a representation, or holds out inducements to another, in consequence, and on the faith, of which that other person alters his position, incurs any obligation or involves himself in any liability, and but for which, such alteration of position would not have taken place nor liability incurred, the promise in such a case is not a mere *nudum pactum* from which the party making it can withdraw; and he will be compelled in equity to make it good: *Crosbie* v. *M'Doual* (1); *Skidmore* v. *Bradford* (2); *Hammersley* v. *De Biel* (3); *Bold* v. *Hutchinson* (4); *Prole* v. *Soady* (5); *Loffus* v. *Maw* (6); *Smith* on Contracts (7); and such promise or representation will be enforced not only against the person himself who has made it, but against his representatives after his death: *Coverdale* v. *Eastwood* (8). Even at law it has been held that a man making a representation and so conducting himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it, and did act upon it as true, is bound by such representation: *Pickard* v. *Sears* (1). Our evidence shews that the marriage took place on the faith of the promise made by *Richards*, by parol in the first instance and afterwards embodied in the document of the 10th of March, 1874, signed by him for the express purpose of inducing Mrs. *Marshall* to withdraw her objections. Without this document Mrs. *Marshall* would not have given her consent, and without her mother's consent Mrs. *Dashwood* would not have married the Plaintiff; and by contracting the marriage Mr. and Mrs. *Dashwood* have incurred expense, have involved themselves in liabilities and been compelled to raise money on her reversion, which would not have been the case if the promise on the faith of which the marriage took place had been carried out.

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(1) 13 Ves. 148.
(2) Law Rep. 8 Eq. 134.
(3) 12 Cl. & F. 45, 61, n.
(4) 5 D. M. & G. 558, 565.
(5) 2 Giff. 1. 5 Jur. N.S. 1382
(6) 3 Giff. 592. 8 Jur. N.S. 607
(7) Pages 160, 161.
(8) Law Rep. 15 Eq. 121.

The *Statute of Frauds*, on which the Defendants rely, has no application. A verbal promise to leave money by will is not within the *Statute of Frauds*, s. 4: *Fenton* v. *Emblers* (2); *Ridley* v. *Ridley* (3); and where, as in this case, marriage has taken place on the faith of the promise, any letter or document however informal is sufficient evidence of the promise to enable the Court to enforce it: *Luders* v. *Anstey* (4); *Lewis* v. *Madocks* (5). And further, the *Statute of Frauds* cannot be set up where a mere parol contract has been followed by some act of part performance: *Ungley* v. *Ungley* (6); *Nunn* v. *Fabian* (7). In this case there was a distinct recognition of the promise by payment of the first quarterly instalment of the annuity of £500, and the promise (only not carried out by *Richard's* death) to send a cheque for the next quarter's instalment. We therefore submit that we are entitled to recover from the estate of *Richards* the arrears of the annuity up to his death, and also the £10,000, with interest from his death.

Ince, Q.C., and *Ingle Joyce*, for the Defendants, the executors of *Richards*, were not called upon.

(1) 6 A. & E. 469.
(2) 3 Burr. 1278.
(3) 34 Beav. 478.
(4) 4 Ves. 501.
(5) 8 Ves. 150.
(6) 4 Ch. D. 73; 5 Ch. D. 887.
(7) Law Rep. 1 Ch. 35.

BACON, V.C.:—

In my opinion this action cannot be sustained. The main argument for the Plaintiffs has been one of law founded upon a plain and well-established doctrine of this Court, the summary of which was read from *Smith* on Contracts, which expressed as well and distinctly as it can be expressed the rule and the principle on which the rule is founded. If a man makes a representation on the faith of which another man alters his position, enters into a deed, incurs an obligation, the man making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of the payment of an annuity, or to make a provision by will. That in the eye of a Court of Equity is a contract, an engagement which the man making it is bound to perform. That is to state the principle in its most naked, but not its least forcible shape; and the cases referred to were all referable to that principle. *Hammersley* v. *De Biel* (1) and the other cases, all of which are perfectly familiar and all of which were with great clearness laid before the Court, are all instances of the mode in which the Court has given effect to the principle adverted to.

But there is not one of those cases in which the man making the representation or the promise has not been brought face to face, either with the persons for whose benefit the promise was made or, with the subject to which the promise extended, and the present case is deficient in that respect. There is a missing link. There is nothing at all to connect the contract of marriage between Miss *Marshall* and Captain *Dashwood* with the engagement which the testator entered into. Taking the instrument of the 10th of March, 1874, by itself, what does it amount to? That it is mere *nudum pactum* nobody can question for a moment. It is called an agreement, but of course I cannot look at it as an agreement, because it bears no stamp. I do not stop to consider that. It is an undertaking on the part of the testator, his handwriting to that paper having been proved, that he will allow £500 a year during his life, and alleging the fact that he has by his will bequeathed to Captain *Dashwood* £10,000 which is to become payable after the death of Mr. *Richards*. That, I say, is merely *nudum pactum*. To make that a contract in favour of other persons a great deal of other evidence than that which has been adduced is absolutely necessary. First of all it is proved beyond doubt that neither Mrs. *Marshall* nor Miss *Marshall* ever set eyes upon Mr. *Richards*. Reference is made to some letters which passed, which are merely complimentary letters, such as might pass between persons strangers to each other, containing compliments and acknowledgments of the receipt of photographs of the lady, and so on; but in no one of which is reference made to any intended marriage, or to any engagement made by Mr. *Richards* with that marriage in prospect. Nor, having considered all the evidence that has been adduced, does it come to anything. The matter is all left in perfect vagueness. It depends wholly on the evidence of Captain *Dashwood*, and Captain *Dashwood* undertakes to supply that which I have called the missing link, and to shew that this engagement of Mr. *Richards* had reference to the approaching marriage between the Plaintiffs. But for that there would not be a moment's hesitation; nobody could say that such a paper bound Mr. *Richards* longer than he chose to be bound by it:—"I allow you £500 a year, I have left you £10,000 by my will. I have a right to withhold that allowance and to revoke the testamentary disposition I have made whenever it suits me to do so." There is not a shadow of evidence in any part of the case that would enable me to say to what extent the regard and friendship that Mr. *Richards* had for Captain *Dashwood* is to be carried. It is in evidence that he did upon two occasions not lend but give, as Captain *Dashwood* would have it, forced upon him, the acceptance of two sums of money. That may very well have happened if he had the money, as it appears to me he had, even in the case of a slighter acquaintance than Captain *Dashwood* had with Mr. *Richards*. But I repeat there is no particle of evidence shewing me that anything like affection or esteem in the proper sense of the word existed between these parties. What, then, does the evidence of Captain *Dashwood*, which, as I have said, is the only evidence in the case, come to? It comes to this, that Captain *Dashwood* was a suitor to Miss *Marshall*; her mother, with great reason and prudence, knowing that he had nothing, as far as I know, to depend on but his half-pay, considered that he was not a suitable husband for her daughter, and that the means for maintaining an establishment would not be forthcoming, and she positively refused her consent. Then, on the 16th of February, 1874, Captain *Dashwood's* statement is that he waited upon Mr. *Richards* and had an interview with him, and that as there was no chance of an appointment at *Ceylon* which Mr. *Richards* had endeavoured to procure for him through the bishop (the Defendant), "he said, as Mrs. *Marshall* would not agree, he thought my case a very hard one. He then proposed to make me an allowance of £500 a year, and as that would cease with his life he would leave me by will £10,000." That is the description of that interview given by Captain *Dashwood* in his evidence.

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(1) 12 Cl. & F. 45, 61, n.

[His Lordship, after referring to the letter (without date) stated by Mrs. *Dashwood* to have been received from Captain *Dashwood* on the 16th of February, and to have been communicated to her mother, continued:—]

The mother has stated that she thereupon was satisfied, and that she gave a conditional consent. But being desirous that the undertaking of Mr. *Richards* should be in some tangible form (I use her expression), she desired that it should be furnished in some way. Thereupon Captain *Dashwood* goes on the 10th of March, and this is what he says: "I sent to him, but he was too unwell to see me. I saw him on the 10th of March in his room. I told him that Mrs. *Marshall* desired some documentary proof. He said he could not write." He was in that state of debility at that time—and I am taking Captain *Dashwood's* account of it—"He said he could not write; he desired me to write. I did; he dictated. I said, 'Shall I call up Mrs. *Harper?*'" Captain *Dashwood* was quite aware it was necessary to have an attesting witness, or, if not necessary, at least expedient and proper. "He said, 'No, it is wholly between ourselves,' and he declined the assistance of an attesting witness. He was perfectly competent to transact business; perfectly sound in his mind, not well in his body." And Captain Dashwood says further, he was not aware of the testator having had *delirium tremens*, and he thought his habits were always temperate. Captain *Dashwood* was examined by interrogatories upon this particular interview, which took place on the 10th of March. Contrasting the statement in his deliberate affidavit made in answer to those interrogatories, in which he says that at this distance of time he cannot remember or state the particulars of the conversation, with the detailed and circumstantial account which he now gives, which of them am I to believe? Am I to believe him when at his leisure in his own room he had to answer the interrogatories, but had forgotten all the particulars more than he chose then to state, or am I to adopt the more detailed and specific account which he gives when under examination in the box? I should have expected the two accounts would tally exactly. I should have expected that under the exigency the answer to interrogatories would have said at least all that he has said in the box. I do not find that he has. As nobody was present in this sick man's room but Captain *Dashwood* and the man who was too ill to write, there is no other evidence than that which Captain *Dashwood* gives; and between his two statements I find an irreconcilable difference. Then it is said that Mrs. *Marshall* supplies the deficiency. In the witness-box she says that she did consent conditionally on the 16th of February, though not unconditionally until the 10th of March, when the document was produced, but in her answer to the interrogatories she says she never did consent until after she had seen the memorandum of the 10th of March. I cannot admit the explanation now given in the box in contradiction to this explicit statement given in answer to the interrogatories. Then, if I look further, I find that Captain *Dashwood*, on the 7th of March, before the 10th, before that requisition which it is said Mrs. *Marshall* had stipulated for had been made, goes to *Doctors Commons*, and there, in solemn proceeding, alleges that the marriage intended to take place is with the consent, which has been obtained, of the father of Miss *Marshall*. How am I to reconcile that with the fact that Mrs. *Marshall*, who says she had a kind of power of attorney from her husband to consent, never did consent till the 10th of March? Mrs. *Marshall* may have thought she had full authority from her husband to consent. If she had exercised that authority, Captain *Dashwood* may very properly have said that the father's consent had been obtained. But then it would have been on the 7th and not on the 10th of March. With these discrepancies in Captain *Dashwood's* evidence, he being the only witness who can approach anything like a support to this case, what can be done? What safety would there be in any human transactions if this scrap of paper got from a sick man on such terms as these were to be twisted into a representation that he would undertake the obligations there mentioned provided the marriage between Captain *Dashwood* and Miss *Marshall* took place? Mrs. *Marshall* may have been under a mistake when she saw that paper, but the paper came, not from Mr. *Richards* to her, but from Captain *Dashwood* to her. Captain *Dashwood* had promised he would get this thing from *Richards*, and the letter of the 16th of February may justify me in concluding that they may have believed him so far, and said, "Bring it to me in writing." When it is brought what is it? It is a mere engagement that "I will, so long as I think fit, give you £500 a year, and I have left you £10,000 by my will." That is not to be construed into a contract on a marriage. Mrs. *Marshall*, in her evidence, insisted that the money should either be settled or given to Captain *Dashwood*. If there had been any talk about the settlement, one could have had something to think about. If Mr. *Richards* meant that as a provision for the marriage, I should have reasonably expected to find in this document, which is not without a pertinent form as well as plain meaning, some allusion to a settlement. But no. On taking that paper with which they are satisfied—whether they knew the law or not does not signify in the least—without a settlement or provision that the £500 a year or £10,000 should be for the benefit of the intended husband and wife and their children—without any provision of that sort the marriage takes place, because, on the 7th of March, before the paper was written, Captain *Dashwood* had pledged his oath that full consent had been given to his marriage with Miss *Edith Marshall*. On such materials it is impossible to say this case comes within the principles on which it has been attempted to raise it. It is unnecessary to go into those topics which have been shadowed out, and which might form the defence. I know nothing about them, and have nothing to say about them.

[His Lordship, after adverting to other parts of the case, the mode in which application was made to the Defendants, and the statement in the solicitor's letter to the bishop that both Captain and Mrs. *Dashwood* asserted that they were engaged to be married upon the promise of Mr. *Richards* to provide for them, continued:—]

There is no such thing in the case. The document, which is the only thing I can look to, is no provision for them. It is at the most a gratuitous promise—a promise which may be broken without violating any rule of law—that the testator will allow *Captain Dashwood* £500 a year while he lives, and that he has left to him £10,000 by will. Considering that the testator died in October or September, 1874, I think the interval a little remarkable. But I do not found my judgment upon that. What I decide is, that this thing called an agreement is of no binding force or effect upon the dead man or the persons who represent his estate, that nothing was ever done upon it, and that if the marriage took place on any reliance on that paper, the Plaintiffs relied on a paper which does not purport to be binding, but which in its terms is *nudum pactum*. The claim must therefore be dismissed with costs.

Solicitors: *G. Badham; Gregory, Rowcliffes, & Rawle,* agents for *Warden & Ponsford, Bardon,* near *Taunton.*

WILLIAMSON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

V.-C. H.
1879
May 1, 2.

[1877 W. 276.]

Pleading—Reply—Striking out—Embarrassing Reply—New Claims—Facts by reference to Independent Document—Pleading Evidence—Pleading Arguments—Rules of Court, 1875, *Order* XIX., *rr.* 17, 18, 20; *Order* XXVII., *r.* 1.

A reply must not refer to an independent document, such as Plaintiff's answer to interrogatories, as containing facts on which the pleader relies, without setting out such document itself as part of the reply.

A reply must not set up new claims.

A reply must not plead mere evidence, or argument, or state conclusions of law to be drawn or inferred from the facts pleaded.

Upon motion by a Defendant, the whole of a reply faulty in those respects was ordered to be struck out as embarrassing, although the notice of motion did not in terms ask to have the whole reply struck out, but only to have particular passages struck out, without specifying them otherwise than by reference to what was to be left in; and leave was given to the Plaintiff to put in such other reply as he might be advised.

Order XIX., rule 20, of Rules of Court, 1875, does not apply to a reply to an ordinary defence unaccompanied by a counter-claim; and where a Plaintiff is replying to an ordinary defence setting forth facts which it is merely desired to traverse, it is not necessary to traverse specifically such facts one by one.

It is competent for a Plaintiff to introduce new matter by way of set-off or by way of controverting the statements of the defence, provided that he do so within a reasonable compass and in a reasonable manner.

THIS was an action by the owner of lands severed by the *Chester and Holyhead Railway*, which was now vested in the Defendants. The statement of claim alleged wrongful interference by the Defendants with a private roadway belonging to the Plaintiff under a girder bridge over which the railway was carried, and with a level crossing as originally constructed to connect the Plaintiff's severed lands; and the Plaintiff claimed damages in respect of obstruction of the access between the severed lands, and of non-repair and non-drainage of the Plaintiff's roadway under the bridge, and an injunction to restrain the Defendants from permitting certain obstructions to remain on the site of the Plaintiff's original level crossing or the approaches thereof, or the level of the railway as originally constructed to remain raised, and from so working or using the railway as to obstruct the user of the level crossing, and also from permitting the headway of the bridge to remain lower than nine feet, or otherwise preventing the user by the Plaintiff of his roadway in as convenient a manner as the same was used before the bridge and roadway were altered by the Defendants.

The statement of defence, which was sixteen pages in length, denied the wrongful interference, and all injury to the Plaintiff; alleged the substitution of another level crossing, and other conveniences; pleaded consent and acquiescence on the part of the Plaintiff in what the Defendants had done; stated the substance of several sections of the *Chester and Holyhead Railway Act* (under which the railway was made, and which was passed before the *Railways Clauses Consolidation Act*, 1845), relating to the accommodation works to be done thereunder; and set out portions of a correspondence which had taken place with reference to the matters in dispute.

The Plaintiff then delivered a reply which was thirty-six pages in length. The first five paragraphs, extending over the same number of pages, gave the substance of sixteen sections of the *Chester and Holyhead Railway Act,* and, amongst others, sections 322 and 323, providing that if in the exercise of the powers of the Act any road should be so interfered with as to be impassable or dangerous to travellers, the company should before commencing their operations make a substituted road, and in case they did not do so, should forfeit £20 a day, and such penalty should in the case of a private road be paid to the owner; section 324 providing for the restoration (where posssible) of the former road within a limited time, unless consent should be given to an extension of time, which consent the Plaintiff averred had not been given; and section 324 imposing a penalty of £10 in case the original road should not be restored or the substituted road completed within a specified time. Then in a subsequent part of his reply the Plaintiff submitted (which was a case that he had not made by his previous pleadings) that he was entitled to recover these penalties in the present action, or, if the Court should be of opinion that they were not recoverable therein, in another action in the High Court of Justice. The 6th paragraph of the reply began as follows:—" For the sake of brevity in the reply, the

Plaintiff has herein referred to his answer to the interrogatories administered to him in this action by the Defendants;" and in subsequent parts of his reply the Plaintiff frequently referred to and relied on facts stated in his answer, but not averred in the reply, and the following were instances of some of such references:—"The Plaintiff has in his statement of claim and in the 11th paragraph of his answer adduced facts shewing" . . . . and he further says, "the effect of the prejudicial interference in the Plaintiff's answer and herein stated, was" . . . . "regard being had to" . . . . "and to the other facts and circumstances herein and in the Plaintiff's statement of claim and answer appearing, the Plaintiff denies" (certain statements in the defence) "otherwise than as they are in accordance with the Plaintiff's said answer, and especially paragraphs 16, 18, 19, and 21 thereof, and with this reply." The reply also comprised much matter which was in fact evidence, and contained argumentative deductions from and statements of the effect in law of the facts stated or referred to, and the 52nd and concluding paragraph was as follows:—"Except as to such of the allegations and statements in the Defendants' statement of defence, or such parts of them as are hereinbefore partly or wholly admitted, and subject only to such admissions, and save so far as the statements of the Plaintiff in his statement of claim are admitted to be true and well founded in the Defendants' statement of defence, the Plaintiff joins issue with the Defendants on their statement of defence."

Dickinson, Q.C., and *Speed*, for the Defendants, now moved that the statements contained in the reply other than and except paragraph 52, and such other statements therein as admitted any allegation or statement in the statement of defence to be true, might be struck out as tending to prejudice, embarrass, or delay the fair trial of the action, or as being an abuse of the process of the Court and oppressive upon the Defendants, or on such other ground as to the Court might seem meet; or, as an alternative, that the Plaintiff might be ordered to amend his reply. They contended that the reference to and reliance on the facts stated in the answer to the interrogatories, the new case made as to the penalties, and the pleading of evidence and argument, were fatal objections to the reply; and, moreover, that it was prolix, and generally so embarrassing and improper a pleading as to render it impossible for the Defendants to know how to frame their rejoinder. They referred to Rules of Court, 1875, Orders xix. and xxvii., and cited *Cashin* v. *Cradock* (1), *Davy* v. *Garrett* (2), and *Heugh* v. *Chamberlain* (3).

Hastings, Q.C., and *O. J. Williamson*, for the Plaintiff:—

The nature of the case made by the Defendants rendered a reply of this character unavoidable. A reply is a pleading in which it is not necessary for a Plaintiff to confine himself to mere admissions or traverses of the defence, and he may combine traverse with confession and avoidance: *Hall* v. *Eve* (4).

[Hall, V.C.:—Anything is legitimate which adds to, qualifies, or explains the allegations of the defence, unless it is shewn to be wholly irrelevant. When the rules were prepared the view was taken that after defence new matter should generally be introduced by way of amendment, and that is, in my opinion, the more consistent course, but it has not been in fact always enforced as the rule under the General Orders.]

The reply in *Davy* v. *Garrett* set out letters and accounts, and pleaded a great amount of matter which was wholly irrelevant and immaterial, which is not the case here.

Dickinson, in reply.

Hall, V.C.:—I feel a difficulty in applying your notice of motion. You have not in form asked to have the whole of this reply struck out, but to have particular parts of it struck out without specifying them. The striking out is something to be done by the Court, and it must be specific.

Dickinson, Q.C.:—We do not ask that particular lines or paragraphs should be struck out, but we ask by reference to what should be fairly left in, as paragraph 52, and the simple admissions of statements in our defence, that all else should be struck out.

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(1) 3 Ch. D. 376.

(2) 7 Ch. D. 473.

(3) 25 W. R. 742.

(4) 4 Ch. D. 341.

HALL, V.C.:—There are some simple admissions, and there are others associated with statements to which you would probably take exception, and with statements in the answer.

Dickinson, Q.C.:—The Plaintiff has himself complicated his reply so as to occasion great difficulty in striking out particular passages, and the proper order would appear to be, that the pleader should himself amend his statement. This is what was done by the Master of the Rolls on an application under Order XXVII., rule 1, with reference to a statement of claim in *Herring* v. *Bischoffsheim*, before the Master of the Rolls on the 17th of February, 1876.

Hastings, Q.C.:—There the applicants specified the particular passages they desired to be struck out.

Dickinson, Q.C.:—So that, although the pleadings in that case were so framed as to render this possible, the only order the Master of the Rolls would make, as a kind of mercy to a pleader under a new practice, was that the Plaintiff should be at liberty to amend.

HALL, V.C.:—Is there any case in which the Court has made an actual order on either party that he do amend?

Dickinson, Q.C.:—Not that we are aware of. In *Cashin* v. *Cradock* (1), in which case Vice-Chancellor *Bacon* was affirmed by the Court of Appeal, the statement of claim was ordered to be struck out, but this was without depriving the Plaintiff of the right to make another proper statement of claim under Order XXVII., rule 1. Whatever the Court can order to be struck out, it has in the alternative the power of ordering to be amended. I submit that upon our notice of motion as it stands the Court may, under the general application for such other order as shall seem meet, strike out the whole reply, giving the Plaintiff liberty to amend; for I rather feel that the order to strike out ought to contain a description of the paragraphs to be struck out.

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(1) 3 Ch. D. 376.

HALL, V.C.:—

I think it is competent for me to take that course upon this notice of motion, and I shall order the whole to be struck out, so that a new reply may be put in.

The view that I take of this case is, that, from the frame of this reply, the Defendants are embarrassed with reference to the course which they are to take in their further proceedings in this action; and I think it will suffice for the purpose of dealing with this application to say that, in my judgment, this reply is not a proper pleading at all, having regard to what is required by the Rules and the Orders as to that which is defined as a reply. For I consider that the reply should, in itself, contain all that can be called pleading. In making that observation, I refer to what I consider is a fatal defect in this reply, the not inserting in the reply that which is only to be found there by way of reference to the answers to the interrogatories.

The object of pleading is to have shewn and stated on that which would have formerly been called the record the whole of the case on each side, and the whole issues between the parties. It seems to me to be a fatal error in this pleading to make use of an answer which has been filed for the purpose of discovery, and to treat that, without setting it out in the pleading itself, as being part of the pleading.

That is a course which would lead to contests and disputes as to what part of the answer, or whether the whole of a particular paragraph in the answer, or only some particular portion of that paragraph was meant to be put in the reply so as to raise issues between the parties. It seems to me that that, in itself, is fatal to this reply, and it is no excuse to say that it has been done for the purpose of avoiding expense and prolixity. It is, in my opinion, greatly embarrassing to the Defendants in dealing with the case. Of course, in framing their rejoinder, the first thing they have to consider is, whether they can rest simply and solely upon a rejoinder which merely joins issue, or whether, in reference to any new statement of fact brought out and mentioned in the replication itself, or the attempted incorporation into the replication of the answer, it is necessary for them to put in something special in their rejoinder, so as to avail themselves, it may be, of a new

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feature in the case in the nature perhaps of confession or avoidance, or in itself something completely destroying the effect of that which is set up in the reply as new matter. It seems to me that that alone is sufficient to dispose of the case, and I desire to say that that is the main ground on which I wish to rest my judgment.

There are other features in this case which seem to point to this pleading not being such as the Court would be disposed to sanction. It is not necessary to say whether they of themselves, and without what I have already adverted to, would have sufficed to justify the course I take, but I am very much disposed to think that the objection that the reply sets up new claims is a good objection; for, although it has been said that penalties claimed by the reply which are not claimed in the statement of claim or the writ must be disregarded, still there are the claims put forward, and the pleader for the Defendants is embarrassed by them. It is not for him to take upon himself to disregard them altogether and to refrain from going into any rejoinder because, if the claims for penalties had been brought forward properly, he would have been able to shew that either by conduct or in fact the penalties had been released and given up, and therefore that they could not be claimed. He is not to be embarrassed by considering whether the Court, when the matter comes to a hearing, will let the Plaintiff, supposing he fail in everything else, fall back upon or claim some of those penalties in the nature of damages or otherwise, instead of having the specific relief which he claims in respect of this particular right of access in the one way or the other, either under the bridge or upon a level crossing. It seems to me that is another substantial and important objection to this pleading.

Then it is clear, and not disputed, that there is a vast deal in this reply which is mere evidence and mere argument and ought not to be in the pleadings at all. Every now and then the pleader sums up his case, or a particular part of it, and says what the result is, what conclusion ought to be drawn, and what he is entitled to thereupon. That ought not to be there at all. Again, it is said that the reply is prolix or improper because the Plaintiff has set out a number of clauses of the Act of Parliament which need not have been set out, but might have been shortly referred to. As to that, in this particular case the rights of the parties depend, not on any general public statutes, but upon particular Acts relating to this particular railway. While, therefore, I cannot say that this has no influence upon me, I desire to add that, as the Defendants themselves have stated in their defence such of the clauses of the Act as they think material, it is not, in my opinion, unreasonable for the Plaintiff in his reply to have adopted the same course.

Then, upon the general arguments before me, I desire to make an observation which may have some bearing if the Plaintiff should amend his reply. With reference to the form of the reply, I hold, upon the construction of the several rules, that where a Plaintiff is putting in a reply to a defence in which the Defendants have set forth facts, it is sufficient, for the purpose of putting in issue by way of denial those facts stated in the defence, to reply generally. It is not necessary, in the reply, to traverse one by one the particular statements of facts which are contained in the defence; because Order XIX, rule 20, which requires that in every pleading the party is not to deny generally, but specifically, the facts alleged, is inapplicable to the case of a replication to an ordinary defence unaccompanied by any counter-claim. As to a counter-claim, you must deal with that according to the other rule; that is to say, you must answer specifically. I think that that makes all the orders consistent. The particular Order which deals with the question is Order XIX. Rule 17 of that Order lays down the general rule as to pleadings; rule 18 requires that all the facts not appearing in the previous pleadings, and which are meant to be relied upon, must be stated, and all defences calculated to take the opposite party by surprise, or to raise new issues of fact, must be raised; then 20 and 21 are the material rules.

[His Lordship read these rules, and continued:—] Those seem to me to be very clear rules, and I should deprecate very much indeed replications being made unnecessarily long by going in detail through a number of facts alleged in the defence, merely for the purpose of putting them in issue. I hold that it is not necessary to go through all the facts.

I have said in the course of the discussion, that, with reference to the numerous statements which are contained in this replication

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in answer to particular paragraphs in the defence, that as to many of them apparently there may be no objection—I mean that where, in fact, the Plaintiff introduces new matter and new facts by way of set-off, or controverting the statements in the defence, that is all legitimate, provided always that it be done within reasonable compass and in a reasonable way.

For these reasons it seems to me the order I ought to make is, that this reply be struck out, with leave for the Plaintiff to put in such other reply as he may be advised. I have already intimated, as far as I can, the sort of replication that would be legitimate and proper. I have done that to assist in the future proceedings in the action.

As regards the different general objections to this form of replication in its stating evidence and conclusions of law, and containing argumentative matter and the conclusions to be drawn from the whole case, if there be any new replication put in I should expect what I have said as to that to be attended to. I think the Defendants were justified in making this motion, and, therefore, they must have the costs of the application. The Plaintiff will have a month within which to put in a new reply.

Solicitors: *Philpot & Son; R. F. Roberts.*

In re HEIRON'S ESTATE.
HALL *v.* LEY.

[1879 H. 498.]

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1879
April 23;
May 27.

Sheriff—Return to Writ of Fi. Fa., Neglect to make—Costs against Sheriff.

Where a sheriff had failed to make any return to a writ of *fi. fa.*, notwithstanding an order of course directing him to make his return forthwith, he was, upon an application *ex parte* against him for an order *nisi*, directed, upon the authority of *Evans* v. *Davies* (1), to pay both the costs of the order *nisi* and of the previous order of course.

AN order for the Plaintiff to pay to the Defendant the costs of an abandoned motion was made in this action in January last, and

(1) 7 Beav. 81.

the Taxing Master made his certificate on the 27th of February. The Plaintiff made default in payment, and on the 3rd of March a writ of *fi. fa.* against him was lodged with the sheriff of *Surrey*. The sheriff, however, made no return to the writ, and after a correspondence in which he was urged to make his return, the common order was obtained on the 2nd of April, and duly served, directing him to do so forthwith.

April 23. *Langworthy*, for the Defendant, now applied *ex parte* for the usual order *nisi* against the sheriff that he should, within six days after personal notice, make his return to the writ, and in default should stand committed to prison; and he also asked that the sheriff should be ordered to pay the costs of the application for the common order, and of that application.

HALL, V.C., after conferring with the Registrar (Mr. *Clowes*), made the order *nisi*, but in the absence of authority declined to order the sheriff to pay the costs.

May 27. *Langworthy* now renewed his application for costs against the sheriff, and cited *Evans* v. *Davies* (1).

HALL, V.C.:—

Upon the authority of that case I shall order the sheriff to pay the costs of the two applications, but a supplemental affidavit must be filed bringing the matter down to the present date, and shewing that the sheriff had made no return down to the date of the order.

May 29. Order made upon the production of the affidavit.

The Registrar (Mr. *Clowes*) subsequently ascertained by search at the Record and Writ Office that the order in *Evans* v. *Davies* had never been drawn up, and that that case was noted at the Registrar's Office with a doubt as to the order for costs being in accordance with the practice, and with a reference to *In re Christmas* (2); and thereupon mentioned this to the Vice-Chancellor. His Lordship however directed the order to be drawn up, upon the

(1) 7 Beav. 81.

(2) 19 Beav. 519.

ground that should the sheriff now make his return the Plaintiff must come again for costs, while if the sheriff should shew cause against the order *nisi* he could at the same time shew cause against the order for costs, which was part of it.

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Solicitors: *Cronin & Rivolta.*

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[1879 T. 76.]

V.-C. H.
1879
June 28.

Practice—Service out of the Jurisdiction—Rules of Court, 1875, *Order* II., *r.* 4; *Order* XI., *rr.* 1, 1*a*, 3—*Residence in Ireland.*

20Ch D242

The Plaintiff (who resided in *Ireland*) and the Defendant entered into a partnership contract executed in *London* (the Defendant being described as a civil engineer of *Victoria Street, Westminster*) for the construction of a railway in *Ireland*. The Defendant and his family went to reside in *Ireland*, he having to superintend the works in progress. The contract provided that the business should be carried on in *Victoria Street* and *Ireland*, and that the books should be kept at *Victoria Street*. After a very short time this clause was abandoned and the business and the books were carried on and kept in *Ireland*. Disputes having arisen, the Plaintiff, while residing for a short time in *England*, obtained leave from the Chief Clerk, upon an *ex parte* application in Chambers, to issue and serve out of the jurisdiction a writ in an action for the taking of the accounts and for the appointment of a receiver and manager:—

Held, under Rules of Court, 1875, Order XI., rules 1 and 1a, that the application of the Plaintiff was improper, and that the writ must be discharged with costs.

THE Plaintiff, who resided in *Ireland*, and the Defendant, who was described as of No. 113, *Victoria Street*, in the City of *Westminster*, civil engineer, entered into partnership in respect of the construction, in three sections, of a railway in the north of *Ireland*.

The Defendant and his family went in March, 1877, to reside at *Enniskillen*, as the articles of partnership required that he should personally superintend the works in progress of construction; and his offices in *Victoria Street* were shut up and had not been used except for a very short time since the partnership.

One section of the railway was completed, and had been opened

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for traffic. The company had their permanent offices in *Ireland*. Disputes arose between the parties, and the Plaintiff, who was, as alleged, residing in *London* for a few weeks during the season, brought an action in the Chancery Division for, in effect, a dissolution of the partnership; for accounts; and for the appointment of a receiver and manager.

On the 9th of April, 1879, the Plaintiff, upon an *ex parte* application at Chambers, obtained leave from the Chief Clerk to issue the writ of summons, and for service of it in *Ireland*, out of the jurisdiction.

The affidavit made in support of the application stated that the Plaintiff's claim was to have an account taken of the partnership dealings; to have the partnership affairs wound up, and to have a receiver and manager appointed; that the partnership contract was made in *London;* that the object of the partnership was to carry out a contract with the *Sligo, Leitrim, and Northern Counties Railway Company* for the construction of a railway in *Ireland,* the contract price for which was £300,000; that the ground for the dissolution was that the partnership could not be continued except with the certainty of a serious loss; and that the Defendant was a civil engineer carrying on business at *Westminster,* and was so described in the partnership articles, but that he was at present temporarily residing in *Ireland;* and the deponent was informed and believed that the business on which he was then engaged was likely to detain him in *Ireland* for a considerable time.

On the 9th of May, 1879, an order was obtained at Chambers for substituted service of the writ by service upon Messrs. *Tilleard, Godden, & Holme,* the Defendant's solicitors, and by registered letter addressed to the Defendant in *Ireland.*

The Plaintiff, on the 31st of May, delivered a statement of claim in which was set forth the contract, dated the 16th of March, 1877, whereby the Plaintiff and Defendant agreed with the railway company to construct their railway for £300,000, and that the railway was to be constructed in three sections—the first to be completed by the 1st of July, 1878, and the last by the 11th of August, 1880. The statement of claim also set forth the agreement for the partnership between the Plaintiff and Defendant, also dated the 16th of March, 1877, and made at *Westminster.* It provided, among other things, that the business should be carried on at the offices of the firm, No. 113, *Victoria Street, Westminster,* and in *Ireland* at *Enniskillen,* or some other place between *Enniskillen* and *Sligo* contiguous to the works that might be in progress of construction; that the capital should consist of £15,000, which was to be contributed by the Plaintiff, and the partnership was to be limited to the carrying out of the works of the railway; that an account should be opened at the *Munster Bank,* in *Dublin,* or at such other bank as the Plaintiff might determine upon; that proper books of account of all things relating to the partnership should be kept at the offices in *London,* and also in respect of all remittances and payments in *Ireland;* that the Defendant should forthwith proceed to *Ireland* and conduct the operations there.

It was stated that the first section of the railway was not completed by the 1st of July, 1878, but that by arrangement with the company the time was extended to the 18th of March, 1879, and that the Plaintiff had made or obtained further advances of capital, the total advanced, or obtained by him being more than £70,000; that the Defendant had not contributed any capital, and that he declined to do so; and that if the partnership was continued it would be impossible to carry out the contract except on terms which would involve the certainty of a serious loss.

The Defendant's solicitors, with the leave of the Judge, entered a conditional appearance, and on the 30th of May, 1879, took out a summons to set aside the writ and service thereof. The summons was treated as a motion, and came on to be heard with a motion by the Plaintiff for the appointment of a receiver. Evidence had been filed upon both sides. In support of the Defendant's summons it was to the effect that the Defendant in March, 1879, removed with his family to *Ireland* to carry out the works of the railway, and that he took a house there, and had ever since resided there on or near to the line of railway, his office in *London* being locked up, and unoccupied; that the Plaintiff's principal residence was in *Ireland,* and that the whole of the books, vouchers, papers, and documents relating to the partnership and to the carrying on of the railway were in *Ireland;* further, that the partnership name had never been put up at the office in *London;* that no business of the partnership was carried on there for longer than fourteen days after the commencement of the partnership, and that the railway company never had any permanent office, except in *Sligo*. The Plaintiff, on the other hand, stated that nearly all the business of the firm, other than the actual construction of the works, had been transacted in or from *London* by him, and that he had since the commencement of the partnership been absent from his residence in *Ireland* for about half his time on the affairs of the partnership contract, almost the whole of which had been passed in *London*.

W. Pearson, Q.C., and *Millar*, for the Defendant:—

The order here was made, upon an *ex parte* application in Chambers, by the Chief Clerk, and was made contrary to the Rules of Court, 1875. If the Judge had made the order in Chambers, the proper course would be to appeal here, or come with a motion to discharge it, but it is not like a case where both parties appear in Chambers. The Defendant could not ask for an adjournment into Court, or for a certificate to enable him to appeal to a higher Court. The only way open was to bring the matter before the Court, and then, if not satisfied with the result, go to the Court of Appeal.

The case is not within the Rules of Court, 1875. Order II., rule 4, is that "no writ of summons for service out of the jurisdiction or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or Judge," and Order XI., rule 1, is that "service out of the jurisdiction of a writ of summons . . . may be allowed by the Court or a Judge . . . whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action . . . was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made . . ." There has not been a breach within the jurisdiction; no case of that sort has arisen. The words "or otherwise affected" do not apply. The writ ought not to have been allowed to issue. There has been no discretion exercised by the Judge personally. The Chief Clerk has no such authority as he exercised. The affidavit made was not such as the Rules of Court require for the purpose of enabling the Court or Judge to make any order. There has been an irregularity in not stating whether the Defendant is a British subject or not. The result of the whole matter is that the order is void. If it should be considered that the case is within the Rules of Court, then it is submitted that if the Plaintiff had come to the Court the Judge would not, in the exercise of his discretion, looking at all the circumstances, have made the order. The Plaintiff is not seeking to enforce or dissolve a contract only; but in consequence of circumstances which have occurred out of the jurisdiction, he wishes to get rid of the relationship which exists between him and the Defendant in *Ireland* as partners, not a single act having been committed within the jurisdiction to support such an order. *Great Australian Gold Mining Company* v. *Martin* (1) shews that, before a Court or Judge can order a writ to issue for service out of the jurisdiction, there must be a cause of action within the jurisdiction, and that it must be properly verified before a Court or Judge to enable a discretion to be exercised. The contract here is being carried out in *Ireland.* The mere act of signing the contract within the jurisdiction is no ground for asking the Court to enforce, dissolve, or annul it here.

Order XI., rule 1a, is that "whenever any action is brought in respect of any contract . . . the Judge in exercising his discretion as to granting leave to serve such writ or notice on a Defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the Defendant, if resident in *Scotland* or *Ireland,* of a local Court of limited jurisdiction having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in *England,* or in the place of such Defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the Judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shewn." And rule 3 is that "every application for an order for leave to serve such writ or notice on a Defendant out of the jurisdiction shall be supported by evidence by affidavit

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(1) 5 Ch. D. 1.

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or otherwise shewing in what place or country such Defendant is or probably may be found, and whether such Defendant is a British subject or not, and the grounds upon which the application is made."

All the rules clearly shew that the discretion should be exercised by the Judge personally. Order LIV., rules 1 and 2, shew what applications may be made at Chambers, by summons, before a Judge or Master or Registrar, but no authority is anywhere given to the Chief Clerks to make any order at Chambers, and there is nothing in the *Judicature Act* or Orders enabling a Judge to delegate his functions to the Chief Clerks. The order was not only irregularly made, but the affidavit stating that the Defendant was carrying on business at *Westminster*, and that he was "temporarily residing in *Ireland*," was untrue. The Judge must have regard to the comparative cost and convenience of proceeding in *England*, and in this case everybody and everything connected with the contract are in *Ireland*—there is nothing to be done in *England*. The Court cannot appoint a receiver and manager to act in *Ireland*.

[They referred to *McPhail* v. *Lowden* (1); *McIntosh* v. *Great Western Railway Company* (2); *Scott* v. *Corporation of Liverpool* (3).]

Hastings, Q.C., and *Ilbert*, for the Plaintiff:—

The Defendant is not as a matter of fact permanently residing in *Ireland*. He is there carrying out a contract which will soon be concluded. The partnership was entered into in *England*. The Defendant was domiciled within the jurisdiction, as the description of him in the deed proved. The books of account were to be kept in *England*. It was virtually a *London* partnership. Although the word "dissolve" or "dissolution" was not in the writ, this action was for a dissolution and to have the accounts taken; it was in every sense an action seeking to enforce, rescind, dissolve, or annul a contract. As to the irregularity in making the order, every order made at Chambers is the Judge's order. It is merely drawn up by the Chief Clerk under the statute 15 & 16

(1) 27 W. R. 525. ante 632

(2) 3 Sm. & Giff. 146.

(3) 1 De G. & J. 369.

Vict. c. 80, s. 14. The Plaintiff is entitled to assume that this was the Judge s order. The affidavit was taken to the Chief Clerk, and it was quite sufficient for the purposes of the order. It shewed a good cause of action; that the Defendant was out of the jurisdiction, and that the contract was made within the jurisdiction. There was sufficient information before the Court or Judge for the order. All that the Court or Judge has to do is to look at the object of the action and see where the parties are, and it was not necessary to state in the affidavit the comparative cost and convenience of trying the action. It was not necessary to state whether the Defendant is a British subject or not. Looking at the evidence the Court will assume that to be the case. If the action should be tried in *Ireland* the books and papers will have to be brought to *Dublin*, and so far as inconvenience is concerned they might as well be brought to *London*. As regards the taking of the accounts the question of jurisdiction has no bearing upon them.

HALL, V.C.:—

I have made inquiries in Chambers into the proceedings there in reference to the issuing of the writ in this action, and it appears that it was issued without the matter being brought before me personally. In the course of the argument some observations were made in reference to indorsement upon the writ, and it was said that there was an irregularity in that respect, the indorsement being that of the Chief Clerk; but I do not attach any importance to that, because it does not necessarily shew whether it was or was not before the Judge. That is a mode of practice which has been adopted in other Chambers than mine. It is in fact an unimportant minute that the order has been made; it was made in that form having regard to the nature of the application which is made before the commencement of the action, and with a view to save costs in drawing up the order, and so as to embrace all that which takes place subsequently in the action in regard to the service of the writ. That is the object of the practice and the mode of making the minute upon the writ. That point, however, is beside the main questions which have been discussed here as to the

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irregularity of the order. It was contended that it was irregular and wrong because the case is not within the scope of the Order XI., rule 1; but it appears to me that that contention was not well founded, because it is plainly within that rule, or rather within that which I call the second head of it, by reason of this, that the contract was sought to be enforced or "otherwise affected," and I consider this is a contract which is otherwise affected within the fair meaning of the words. It seems to be within those words if not within anything else. That being my view of the section, I then come to rules 1a and 3.

As regards rule 3, it is said that it must be taken literally, and that the order was not made upon proper materials because it was not stated that the Defendant is a British subject. I cannot allow such an objection as that to prevail. I do not think it would be right to hold that that is so vital a matter that the affidavit which does not contain those words, must be considered to be bad, and that I must discharge the writ even if there be merits in reference to it. There are, however, no such merits in the present case. No doubt the particular clause in reference to *Scotland* and *Ireland* existed before, and had reference to service upon foreigners, as to whom it might be taken into consideration by the Judge in giving leave that the Court was dealing with persons not under the allegiance of Her Majesty, and therefore the Court was to consider the propriety of giving them notice of the case against them, and in the proceedings they were told that they were under the jurisdiction of a foreign Court, or at all events that they were not domiciled in this country. Now, as regards rule 1a, it requires three things to be set forth in the affidavit; and one of them is that there must be shewn to the Judge exercising jurisdiction "the amount or value of the property in dispute or sought to be recovered;" and as to that point there is a statement in the affidavit that the partnership has reference to a contract—the construction of a railway in *Ireland*—and that the contract price was £300,000. It is stated that it cannot be continued except with the certainty of a serious loss, and that the Plaintiff claims to be entitled to have the partnership dissolved. I cannot say, having regard to the nature of the action, that there is a want of information in respect either of "the amount or value of the property in dispute or sought to be recovered." The next requirement is that it should appear whether "in the place of residence of the Defendants, if resident in *Scotland* or *Ireland*," there is a "local Court of limited jurisdiction having jurisdiction in the matter." Now, having regard to the nature of the action and the amount in dispute which would have to be dealt with in the proceedings, that requirement does not appear necessary to be considered in this case, as from the nature of it and what appears in the affidavit that is excluded. This provision has reference to this, that there were actions brought in this country for small amounts which required persons who were in *Scotland* or *Ireland* to be brought to *England* possibly as witnesses either in their own cases or otherwise. There was a great hardship in that respect to persons residing in *Scotland* or *Ireland*, and it was to meet that particular grievance that this clause was intended to provide, viz., that it should appear whether there was any such jurisdiction. That part of the clause has reference to small actions not similar to the one before the Court. The next requirement is "the comparative cost and convenience of proceeding in *England* or in the place of such Defendant's residence." As to that it is stated in the affidavit "that the Defendant was a civil engineer carrying on business" at *Westminster*, and was so described in the partnership contract, but that he was at present temporarily residing in *Ireland*, and the deponent "was informed and believed that the business on which he was there engaged was likely to detain him in *Ireland* for a considerable time."

That is all that I find in reference to the "comparative cost and convenience of proceeding in *England* or in the place of such Defendant's residence," and it appears to me that that is a very meagre attempt to comply with the requirement. The Defendant is in *Ireland* looking after the works, according to the provisions of the contract between the parties. He agreed to reside there to look after the works, and he is substantially and not merely temporarily residing there within the ordinary meaning of the words. He is practically located there while the railway works are going on, or until they are put an end to by this litigation, if it should be successful. Being there engaged, it is true he says that he is likely to be detained there for a considerable time, but that comes short of telling the real truth as to the Defendant's residence; and very short of the facts necessary to enable the Court to consider the point as to the comparative cost of litigation going on in either the one country or the other. The Plaintiff and the Defendant are residing in *Ireland*, and both of them are likely to remain there, as I consider, because the Plaintiff is only visiting *London* for a short time during the season; and, that being the state of things, what else do I find? why, that the books of account are kept over there. It is said that that is the wrong place in which to keep them, because the agreement was that they should be kept at *Westminster*. The parties, however, soon found that that was an unworkable clause. The books are kept over there, where, as it seems to me, they ought to be, as these works are going on, and they are required for daily use in reference to the contract, and the persons who are working it, and who know what estimates have to be calculated and what capital may be required for the purposes. All these matters can be better dealt with upon the spot, and therefore the proceedings in the litigation can also be better worked out there, where the evidence can be got from time to time in reference to the subject-matter of it, and certainly with a considerable saving of time. There would be inconvenience in taking the accounts here instead of in *Ireland*, by reason of having to communicate with persons in *Ireland*. It seems to me, therefore, that upon the merits this is a case in which, if I had had brought to my attention all the evidence which has been referred to upon these motions, I should certainly not have made the order complained of. The application in Chambers was *ex parte*, and the Plaintiff who made it got the order at his own risk, and it turning out that it was wrong, he must pay the costs of its being discharged, particularly in a case where there is something substantial, and it appears to me that there is something substantial in this application. The order was improperly applied for. The information before the Court was not sufficient. It appears to me that all these applications ought to come before the Judge himself, and I have given directions in Chambers that that shall be done in future. Consequently, in every case which comes within Rule 1a, there will be no order until I have been personally consulted. The Plaintiff having been wrong in the *ex parte* proceedings at Chambers, the writ must be discharged, and the Plaintiff must pay all the Defendant's costs which have been occasioned by the issuing of it.

Solicitors: *Tilleard, Godden, & Holme; Heath & Parker.*

MASSEY *v.* ALLEN.

[1876 M. 265.]

V.-C. H.
1879
June 19, 26;
July 3.

Practice—Plaintiff going out of Jurisdiction—Security for Past Costs—Amount of Security.

Under the *Judicature Act* when Plaintiff goes out of the jurisdiction security for costs as well past as future may be ordered to such amount as the Court may think fit, in accordance with the old Common Law practice.

THE action against *Allen* and *Hardwick* was commenced by the liquidator of the *International Contract Company*, by leave of the Court, given in February, 1876, in the name of *John Daniel Massey*, with the view of making the Defendants, or one of them, liable for calls for £4000 upon 200 shares (1).

J. D. Massey having died in August, 1877, an order was made soon afterwards that his widow, *Mathilda Massey*, as his executrix, might carry on the proceedings in the action. At the date of the order Mrs. *Massey* was residing at *Highbury New Park, Middlesex*, but she had very recently gone to reside in the Island of *Guernsey*, out of the jurisdiction of the Court. For the Defendant *Allen* the evidence was that the costs of the action were very heavy, there being a great mass of documents involved extending over a period of fifteen years, since the formation of the company in the year 1864, and the Deponent, speaking from knowledge, said that the costs of *Allen*, inclusive of the costs of the hearing, would amount to the sum of £1000 or thereabouts.

This was a motion on behalf of the Defendant *Allen* that the Plaintiff (Mrs. *Massey*) might be ordered within ten days to give security in the sum of £1000 to answer costs in the action, and

(1) 9 Ch. D. 164.

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that in the meantime all proceedings in the action might be stayed as against him. The motion was brought on upon the 19th and was ordered to stand over till the 26th of June, that further inquiry might be made into the practice of the Court before and since the passing of the *Judicature Act*, 1875.

Hastings, Q.C., and *Fellows*, for the motion:—

The great bulk of the costs in this action were incurred before Mrs. *Massey* went to reside out of the jurisdiction. It is submitted that an order should be made which will cover past and future costs. In the Common Law Divisions of the Court it is customary to order security to be given for such a sum as the Judge may think fit: *Harvey* v. *Jacob* (1); *Mason* v. *Polhill* (2); and the Judges of the Chancery Division can, in the exercise of their discretion, follow the same practice. In *Western of Canada Oil, &c. Company* v. *Walker* (3), Vice-Chancellor *Malins* ordered security to be given for £100, and gave leave to the Defendants to renew their motion for further security; and Lord Justice *James*, on the appeal, said it was a matter of discretion, and he should be slow to interfere with the order. Rule 2 of Order LV. of the Rules of Court, 1875, states that "In any cause or matter in which security for costs is required the security shall be of such amount and given at such time or times and in such manner or form as the Court or a Judge shall direct." The old rule 6 of the 40th Consolidated Orders, that "£100 shall be the penal sum in the bond to be given as a security to answer costs by any Plaintiff who is out of the jurisdiction of the Court," is not followed under the new practice: *Republic of Costa Rica* v. *Erlanger* (4); and in the case of *Brocklebank* v. *King's Lynn Steamship Company* (5) Mr. Justice *Lindley* said, "The rule as stated in *Daniell's* Chancery Practice (6) shews that the common form of order is applicable to security for the whole costs, and is not limited to after-accruing costs. The practice seems to me to be well settled": *Stewart* v. *Stewart* (7); *Blakeney* v. *Dufaur* (8); *Lush's* Practice (9). The

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(1) 1 B. & A. 159.
(2) 2 Dowl. 61.
(3) Law Rep. 10 Ch. 628.
(4) 3 Ch. D. 62.
(5) 3 C. P. D. 365, 367.
(6) 5th Ed. pp. 32, 33.
(7) 20 Beav. 322.
(8) 2 D. M. & G. 771.
(9) 3rd Ed. p. 934.

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Defendant *Allen* has established his right, and the security ought to be real and not technical: *Morgan's* Chancery Acts and Orders (1).

Whitehorne, for the Plaintiff:—

The 2nd rule of Order LV. does not apply to security for past costs. No doubt in the Common Law Courts it was customary to give such security as the Judge might think fit, but in the Court of Chancery the security was limited to £100, except in very special circumstances, and that rule ought to be followed. In *Paxton* v. *Bell* (2) Vice-Chancellor *Bacon* said the old rule must prevail, there being no special reason for increasing the amount; and in the case of *Republic of Costa Rica* v. *Erlanger* (3) Lord Justice *James* stated what the practice was, and, though the pleadings there appeared to be very bulky, his Lordship said that "for the £1000 already incurred no security can be given within the meaning of this Order." It is admitted here that the great bulk of the costs were incurred before Mrs. *Massey* went to reside in *Guernsey*. The special circumstances must mean circumstances different from those under the old practice and such as to render the rule as to £100 not applicable. There is no suggestion here of bringing the Plaintiff over from *Guernsey*. The briefs have all been delivered, and there will be no further costs in regard to witnesses. The other side must shew special circumstances, or, at least, that a discretion must be exercised according to the old rule. They have not shewn any special circumstance. Looking at the cases of *Paxton* v. *Bell* and *Republic of Costa Rica* v. *Erlanger*, the practice is settled so far as those decisions go, and it lies with the Defendant to make out a case for security for more than future costs. From a common-sense point of view would it be right to order security for more than future costs? The Plaintiff *J. D. Massey* was allowed to proceed with the action. He incurred heavy costs and died. The action was carried on perfectly *bonâ fide* up to the point of trial. No doubt his interest became vested in the company, and the liquidator carried on the action. There ought to be no order for security for past costs:

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(1) 5th Ed. p. 603, *et seq.*

(2) 24 W. R. 1013. W.N. (76) 122. 247

(3) 3 Ch. D. 62, 69

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Oxenden v. *Cropper* (1). In *Grant* v. *Banque Franco-Egyptienne* (2), Lord Justice *James* said: "It is too late to make the application so far as regards any costs already incurred after the time has been actually fixed for the hearing of the appeal." There is the case of *Imperial Bank of China* v. *Bank of Hindustan* (3), which was under the *Companies Act*, 1862, and there the Lords Justices held that the security for costs given by a limited company was not confined to £100, but must be for an amount equal to the probable amount of costs payable. That case was, however, under a new jurisdiction, and therefore the Court was not bound by the old Consolidated Order. *Paxton* v. *Bell* (4) may be said to be not an authority for contending that the Court cannot go outside that Order.

[HALL, V.C.:—Then the question is one of discretion.]

In *Paxton* v. *Bell* the Vice-Chancellor *Bacon* exercised a discretion, and it was also exercised in *The Julia Fisher* (5). It ought to be exercised judicially. This is an action under the sanction of the Court. The other side say: "The costs will amount to £1000, give us security for the whole;" but there is no authority for that. Substantial security does not mean security for every shilling the Defendant may ask. The security is ordered to be given for the good faith of the action. The nominal is not the real Plaintiff, and the £1000 is only an estimate of the Defendant. If the order asked should be made, there ought to be an opportunity given to cross-examine him as to the amount, and it ought to apply to both Defendants. "It is desirable to extend the bond to all the Defendants": *Daniell's* Chancery Practice (6).

HALL, V.C.:—

The question which has been discussed is an important one in reference to giving security by order of the Court for past costs. The result of the investigation into the practice of the Divisions of the High Court is that according to the practice of the Common Law Courts and Divisions the security ordered to be given extends to past costs. That was the common form, and that practice must be considered to have been adopted substantially as the practice of the High Court of Justice. There may be special cases in which it may be held that the parties applying are not entitled to have security except for future costs. In this case I am of opinion that I ought to follow the practice of the Common Law Courts before the passing of the *Judicature Act*, but I must also give due consideration to the observations of Lord Justice *James* in reference to the special circumstances in the case of *Republic of Costa Rica* v. *Erlanger* (1). The order made there was, however, not at variance with the practice which exists in the Common Law Divisions. I see no reason why in this case I should in the exercise of my discretion confine the security to future costs; I must have regard to the depositions and bear in mind that this is a company in liquidation, and that there will be no embarrassment occasioned to any one in giving a security for costs, as it appears that the liquidator has a fund in the bank sufficient for the purpose. I shall not apply the observation referred to in *Daniell's* Practice, as the affidavit upon which I am acting relates only to the Defendant *Allen's* costs.

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(1) 4 Dowl. 574.
(2) 1 C. P. D. 143, 144.
(3) Law Rep. 1 Ch. 437.
(4) 24 W. R. 1013. WN(76)121
(5) 2 P. D. 115, 117.
(6) 5th Ed. p. 34.

The order will be for security for £1000 for the costs of *Allen*.

July 3. *Cozens-Hardy*, for the Defendant *Hardwick*, moved for an order for security by the Plaintiff for £600, and the Vice-Chancellor made the order.

Solicitors: *Stibbard, Gibson, & Co.; Munns & Longden.*

(1) 3 Ch. D. 62, 68.

V. C. H.
1879
July 10.

BAGNALL *v.* VILLAR.

[1879 B. 332.]

Mortgagor and Mortgagee—Growing Crops cut by Mortgagor—Injunction.

13 Ch D 149

A mortgagor presented a petition for liquidation of his estate, and the trustee appointed went into possession of the mortgaged lands and commenced cutting the growing crops. The mortgagee then put a man in possession and required the trustee to give up possession, which he declined to do.

In an action against the trustee an injunction was granted restraining him from cutting crops and from removing the crops cut after the demand made by the mortgagee.

By an indenture of mortgage dated the 8th of May, 1874, *Thomas Ballinger* conveyed a freehold farm in *Gloucestershire* to the Plaintiffs to secure the payment of £12,000 and interest. The deed contained a power of sale, and covenants by the mortgagor for quiet enjoyment and further assurance.

On the 31st of May the mortgagor filed a petition for the liquidation of his estate in bankruptcy, and in the proceedings under it the Defendant was appointed receiver, and took possession of the property on the 3rd of June. He continued in possession, and was on the 1st of July appointed trustee in the liquidation.

On the 26th of June the Plaintiffs put a man in possession, but the Defendant did not go out of possession. On the 28th of June the Plaintiffs' solicitors wrote asking the Defendant to give up his possession. He did not do so, however, but continued cutting the grass on the farm, having begun to do so before the Plaintiffs' man went into possession.

This was an action against the Defendant for damages for cutting the growing crops upon the lands in mortgage, and for an injunction to restrain him from so doing, and from selling, removing, or otherwise interfering with such of the crops as had been cut by him since the 26th of June.

Woodroffe, for the Plaintiffs, moved for an injunction in the terms above set forth.

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Dunning, for the Defendant, submitted that the mortgagor was entitled to the crops until he was ejected by judgment of the Court in an action for the purpose. *Ex parte Temple* (1); *Spence's* Equitable Jurisdiction (2).

HALL, V.C. :—

I am of opinion that the possession of the mortgagor after the demand of possession was made on behalf of the mortgagees was a wrongful withholding of possession from them, and therefore I shall not allow the Defendant to remove the crops which were growing when they put their man in possession on the 26th of June. The injunction will be as asked for.

Solicitors for Plaintiffs: *Robinson, Preston, & Stow,* agents for *Rowlands & Bagnall, Birmingham.*

Solicitors for Defendant: *Merediths, Roberts, & Mills,* agents for *Ticehurst & Sons, Cheltenham.*

DAVIES *v.* GAMES.

[1878 D. 171.]

V.-C. H.
1879
June 11, 12; *July* 15.

Tenants in Common—Farming Business—Purchase by Brothers of One-third Share—Conveyance to Purchasers as Joint Tenants—Partnership Dealings and Assets.

Three brothers, tenants in common of a farm and lands in *Wales*, carried on a farming business together. One brother died, having devised his one-third share to a nephew, and he and the two surviving brothers, *B.* and *W.*, continued to carry on the farming business. The nephew sold his one-third share of the farm and lands to his uncles *B.* and *W.*, the conveyance being to them as joint tenants, and they continued to carry on the farming business. *B.* died, having given all his property to his wife. The farm and lands were subsequently sold. *W.* claimed, as surviving joint tenant, the proceeds of sale, representing the one-third share purchased from the nephew:—

Held, that the one-third share became involved in partnership dealings, and must be regarded as partnership property, and that *W.* was entitled to only a moiety of the proceeds of sale.

THE Plaintiff, *William Davies*, and his brothers *Benjamin* and *James* (the elder), were tenants in common in fee of a farm called

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(1) 1 Gly. & J. 216.

(2) Vol. i. p. 657, note 1.

Sychnant, and certain lands and premises in *Wales*, subject to a mortgage, by deed dated in January, 1857, for £1500 and interest.

James Davies (the elder) died having by will devised his one-third share of the estate to his nephew *James Davies* in fee. On the 17th of September, 1874, *William Davies*, his brother *Benjamin*, and their nephew *James*, were entitled in equal shares as tenants in common to the estate.

By an indenture of that date *James* (the nephew) for valuable consideration granted unto *William* and *Benjamin Davies*, their heirs and assigns, his undivided third part of the farm and premises to hold the same unto and to the use of them, their heirs and assigns for ever.

Benjamin Davies died on the 2nd of July, 1877, having by his will, dated in April, 1877, devised and bequeathed all his real and personal estate to his wife (the Defendant) *Rebecca Davies*.

The farm, lands, and premises were subsequently sold, and after paying off the mortgage debt the purchase-money, after the deduction of a sum to pay certain simple contract debts for which *William* and *Benjamin Davies*, as between themselves, were liable in equal shares, was paid by consent, a question having arisen as to the division of it between *William Davies* and *Rebecca Davies*, into a bank in their names and the names of two solicitors who were made Defendants.

The Plaintiff claimed two-thirds of the fund on the ground that he was the survivor of the joint tenancy created by the deed of September, 1874, and he asked for a declaration to that effect.

The case of the Defendant, the widow of *Benjamin Davies*, was that *William* and *Benjamin Davies* carried on the business of the farm, lands, and premises in partnership; that *Benjamin* agreed with his nephew *James* to purchase his share for £550, and instructed a solicitor to prepare a draft of the conveyance to him. *Benjamin*, not having money sufficient to complete the purchase, requested his solicitor to procure a loan, and he prevailed upon Mr. *Webb* to lend the money, but as, on perusing the deeds, it was found that the entirety of the farm and premises were subject to the mortgage of 1877, he would not lend the money to *Benjamin* unless *William Davies* would concur in securing the £550 upon the entirety of the farm and premises. *William* agreed to that proposition, provided *Benjamin* would consent to the purchase of the third share being made on behalf of himself and *Benjamin*, instead of on behalf of *Benjamin* alone. *Benjamin* was willing that the third share should be purchased for the benefit of himself and *William* on the same terms as the entirety of the farm and premises had been originally purchased by himself and brothers *William* and *James*. The solicitor was instructed to complete the purchase and the intended mortgage on that footing. The draft conveyance was altered from "To the use of the said *Benjamin Davies*, his heirs and assigns," to "To the use of the said *William Davies* and *Benjamin Davies*, their heirs and assigns," but by inadvertence the words "as tenants in common" were omitted.

From the date of the transaction down to the decease of *Benjamin*, himself and *William* continued to carry on the business of the farm in partnership in the same manner as the same had been carried on. The widow of *Benjamin* denied that any joint tenancy was ever intended to exist between *Benjamin* and *William Davies* in the third share of the estate, although by inadvertence it was limited to them in terms creating at law a joint tenancy therein, and she contended that under the circumstances *William Davies* was entitled to a moiety only, and not two-thirds of the fund in the bank.

The evidence of the witnesses who were examined in Court is sufficiently referred to in the judgment.

Robinson, Q.C., and *W. Barber*, for the Plaintiff:—

There is not the slightest evidence of there having been a partnership between the persons who occupied the farm; nor that the fee simple was ever used as a partnership asset. It is a clear case of joint occupation by those persons, without being partners in any sense of the word. They were certainly not partners in a mercantile sense. If it was a partnership it was one without name or style; without accounts and without capital of any defined kind or amount. There are not partners in a ship, but in the earnings, and so here it was in the stock and crops and not in the land. In *Houghton* v. *Houghton* (1) the Court inferred that real estate used for partnership purposes became an asset, but that case was

(1) 11 Sim. 491, 504.

different from the present in several essential particulars. If this was a partnership it was varied from time to time by the death of one and then another brother. There is no evidence that *William* and *Benjamin Davies* were to take the one-third share of their nephew as tenants in common. The deed was carefully, properly, and technically drawn conveying the third to them as joint tenants, and to hold that they were not so, by allowing the evidence of the solicitor to prevail, would be to take away the legal effect of the deed which he prepared, though his evidence was that the parties gave no instructions one way or the other. The intention, therefore, may be inferred that it was to be a joint purchase, and *William* being the survivor is entitled to two-thirds of the fund.

[They referred to *Randall* v. *Randall* (1), *Brown* v. *Oakshot* (2), and *Steward* v. *Blakeway* (3).]

Hastings, Q.C., and *Rodwell*, for the widow; and for one of the Defendants in whose names the money had been deposited :—

If the brothers had been asked whether it was intended that when either died the survivor should take the whole third share, the answer would have been No, nothing of the kind. It is clear, upon the evidence of the solicitor, that the intention was that the share should belong to them equally, as the other two-thirds did at the time of the purchase. Where there is an agreement to carry on business and share the profits and the losses it is a partnership, and a farming business can be carried on in partnership. The fact that there were no accounts is immaterial. It was acknowledged that there was a common right to profits and a common obligation for losses. There was a valuation of the nephew's share of the farming stock and plant in the same way as the valuation of a share of an outgoing partner in a commercial business. The case of *Randall* v. *Randall* was, if good law, quite distinguishable from this case. The share purchased by *William* and *Benjamin* was in their possession at the time. Freeholds and leaseholds, it is submitted, are placed upon the same footing. The brothers were tenants in common, and the intention clearly was to carry out the purchase of the one-third share so as to leave them in that position, and consequently the widow is entitled to a moiety of the fund.

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(1) 7 Sim. 271.
(2) 24 Beav. 254.
(3) Law Rep. 4 Ch. 603.

[They referred to the cases of *Harrison* v. *Barton* (1), *Jackson* v. *Jackson* (2), *Houghton* v. *Houghton* (3), and *Lindley* on Partnership (4).]

Stallard, for the other of the Defendants in whose names the money was deposited, asked for his costs.

Robinson, in reply.

Hall, V.C., referred to *Morris* v. *Barrett* (5), and was of opinion that it was not dissimilar to this case.

July 15th. Hall, V.C.:—

Having since the hearing of this action examined and considered the authorities referred to and some others, and also the evidence, I have come to the conclusion that the one-third share of the farm in question was a partnership asset and did not, upon the death of *Benjamin Davies*, become the property of his brother *William Davies*, as the surviving joint tenant under the conveyance made of such share to *Benjamin* and *William*. The three brothers *Benjamin*, *William*, and *James*, and upon the death of *James*, *Benjamin* and *William* and *James* the nephew of *Benjamin* and *William*, and after the nephew sold his share to *Benjamin* and *William*, they (*Benjamin* and *William*), in my opinion, carried on the business of farmers in partnership. I consider that *Benjamin* and *William Davies* purchased their nephew's one-third share for the partnership business, and that what Lord *Eldon* said in *Ripley* v. *Waterworth* (6), and what Vice-Chancellor *James* said in the case of *Waterer* v. *Waterer* (7), is applicable to the present case, viz., that the one-third share "became involved in partnership dealings," and "must be regarded as partnership property." The case of *Morris* v. *Barrett*, where the business was that of farmers, is an authority to the same effect. I do not think the fact that the whole purchase-money was borrowed, no part thereof being paid out of the partnership funds of *Benjamin* and *William Davies,* is of importance, so far as to make the conclusion which I have arrived at incorrect. In the case of *Waterer* v. *Waterer* (1) a considerable part of the purchase-money was borrowed on mortgage, and in the case of *Houghton* v. *Houghton* (2) the whole of the purchase-money was borrowed. In that case, however, there were other circumstances going to shew that the property was intended to be partnership property. The parol evidence seems to me favourable to the conclusion which I have come to. The interest on the mortgage made for the purchase-money of the nephew's share was paid out of the earnings of the farming business, and *William Davies* stated that he and *Benjamin* bought the share together, just as they bought cattle, stock, and other things for the farming business; and from the nephew's evidence it appeared that when his share was sold there was a valuation and ascertainment of the stock and so forth, and the liabilities of the business; that they were found to balance one another, and that *Benjamin* and *William* took to his (the nephew's) share of the stock, and also took upon themselves the whole of the business liabilities, the transaction being thus substantially one of a purchase of a share of a mixed property, viz., the farm and stock—a going concern. It is unnecessary for me to determine whether or not the Plaintiff's case can be sustained in reference to the alleged error in framing the conveyance, or whether or not this is open to the Defendant, the widow, there not being a counter-claim of rectification, regard being had to the farm having been sold by arrangement, and the conveyance of the nephew's share thereof parted with. I by no means intend to decide that the Court might not determine adversely to the Plaintiff in reference to this, and even if necessary give the Defendant, the widow, leave to amend the statement of defence, which probably might be sufficiently done under the circumstances without involving an actual counter-claim. There will be a declaration that the fund in the bank is divisible into moieties between the Plaintiff and the Defendant, the widow, and an order for transfer accordingly.

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(1) 1 J. & H. 287. 7 Jur NS 19
(2) 9 Ves. 591.
(3) 11 Sim. 491.
(4) 2nd Ed. vol. i. p. 667, *et seq.*
(5) 3 Y. & J. 384.
(6) 7 Ves. 425.
(7) Law Rep. 15 Eq. 402, 406.

(1) Law Rep. 15 Eq. 402, 406.

(2) 11 Sim. 491.

There will not be any order as to costs, except that the trustees costs must be provided for, but these will not include any costs of the Defendant *Games* in respect of the joint defence of himself and the widow.

V.-C. H.
1879
DAVIES
v.
GAMES.

Solicitors: *Thomas White & Sons,* agents for *T. W. Garrold, Hereford; E. M. Chubb,* agent for *William Games, Brecon.*

BUND *v.* GREEN.

[1872 B. 189.]

V.-C. H.
1879
July 21.

Will—Exclusion of Persons who were Next of Kin—Intestacy as to Residue.

Testator, after stating that it was his will that neither *L. S.* nor her children should take any benefit from his property other than what was given to her or them; and that it was not his intention that *G. S.*, or any person claiming under him, should partake of any share in the distribution of his personal estate except what was given to him or them, said he considered that the provision which he had made for his brother and two sisters was adequate for their support, and therefore it was his intention that they should not, nor should any of them, take any benefit from his property except what was given for them; and he declared that *L. S.*, *G. S.*, and his brother and two sisters, should not be entitled to take any share of his personal estate of which he might happen to die intestate, but should be wholly excluded therefrom in the same manner as if they had all died in his lifetime. There was an intestacy as to residue:—

Held, that the next of kin other than the five persons named who were excluded were entitled.

JAMES KIBBLEWHITE, who died in 1845, by his will made in 1837, after giving several legacies to persons named and numerous directions to the trustees whom he appointed executors of his will, and after stating that he had incurred considerable expense in bringing up, maintaining, and educating his niece *Lucy Seeley*, by which expenditure she derived greater advantages than either of his other nieces, said: "It is therefore my will that neither she nor her children shall ever take or enjoy any benefit or interest from my property other than and except what is hereby or otherwise specifically given or provided for her or them respectively." And the testator, after stating that he had secured to his nephew George Stone a share of a professional business whereby he considered that he was better provided for than either of his other nephews, and inasmuch as he had brought him up and educated him at his own expense, said: "It is not my intention that he or any person claiming under him shall partake of or be entitled to any share or proportion in the distribution of my real or personal estate except what is hereby given or provided for him or them respectively; and whereas I consider the provision I have already settled on or made for my surviving brother and each of my two sisters to be fully adequate for their better support, and therefore it is my intention that they shall not, nor shall any or either of them, take or enjoy any benefit or interest whatever from my property other than and except what is hereby or otherwise given or provided for him, her, or them respectively; Now I do hereby declare that it is my will that they the said *Lucy Seeley, George Stone, Edmund Kibblewhite, Mary Ellis,* and *Lucy Sadler* [the brother and two sisters] shall not, nor shall any or either of them, be entitled to take any part of my real estate, nor any share or proportion in the distribution of my personal estate of which I may happen to die intestate, or not have fully disposed of either in the character of my heir or heiresses at law, or as my next of kin, but shall be wholly excluded therefrom in the same manner as if they had all died in my lifetime."

Edmund Kibblewhite, Lucy Sadler, George Stone, and *Lucy Seeley* survived the testator.

Mary Ellis died in his lifetime, leaving two children. *Lucy Sadler* had three children, and they were living at the testator's death

Edmund Kibblewhite, Lucy Sadler, George Stone, and *Lucy Seeley* were, with others, the next of kin of the testator, and would be entitled to participate in the distribution of the personal estate unless the terms of the will excluded those persons named.

The testator died intestate as to residuary personal estate.

Hastings, Q.C., and *Nalder,* for the Plaintiffs—trustees—stated the facts.

W. Pearson, Q.C., and *Cadman Jones,* for the first-named

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Defendant, one of the next of kin not named in the clause of exclusion, submitted that all those persons above named were excluded from participating in the residue, and that the two persons who were also next of kin at the time of the testator's death and not named in the above clause, were entitled to the whole of the residue. There was nothing in the will which amounted to a gift of residue to those who would have been next of kin, if those persons who were excluded had been dead. A person might be excluded from a class who would take by devolution: *Ackroyd* v. *Smithson* (1); *Amphlett* v. *Parke* (2); *Vachell* v. *Breton* (3); *Lett* v. *Randall* (4). *Fitch* v. *Weber* (5) was also referred to.

Eddis, Q.C., and *Romer*, for the representatives of *George Stone* and *Lucy Seeley*, who were two of the next of kin at the time of the testator's death, submitted that their claim came within the decision in *White* v. *Springett* (6). They also referred to *Johnson* v. *Johnson* (7) and *Taylor* v. *Taylor* (8).

Joshua Williams, Q.C., and *Cozens-Hardy*, for the children of *Lucy Sadler*, submitted that the true construction of the will was that this was a bequest by implication to those persons who would have been next of kin of the testator at the time of his death if all those persons whom he excluded had been dead, and therefore these children were entitled to participate in the residue.

The case of *Fitch* v. *Weber* (9) did not apply, but the case was governed by *Stevens* v. *Hale* (10), *Tilley* v. *Collyer* (11), and *Bradford* v. *Foley* (12).

B. B. Rogers, for other trustees.

HALL, V.C.:—

I am of opinion that according to the true construction of the will the declaration of the testator is one which amounts to a gift

(1) 1 Bro. C. C. 503.
(2) 2 Russ. & My. 221, 232.
(3) 5 Bro. P. C. 51.
(4) 3 Sm. & Giff. 83. 1 Jur NS 747
(5) 6 Hare, 145, 153.
(6) Law Rep. 4 Ch. 300.
(7) 4 Beav. 318.
(8) 3 D. M. & G. 190. 17 Jur 583
(9) 6 Hare, 145.
(10) 2 Dr. & Sm. 22.
(11) 3 Keb. 589.
(12) 1 Doug. 63.

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in favour of those persons who take by law upon a distribution of personalty under the statute, but excluding the persons specified, and not including those who would come within the description of persons who would take under them. The only real ground of contention, as it seems to me, was to distinguish this case from other cases, and which, so far as they have any bearing, apply to the words "in the same manner as if they had all died in my lifetime,"; but I cannot give an alternative effect to the words for the purpose of letting in the children of the persons excluded; therefore those persons who were next of kin other than those who were excluded will take the residue.

Solicitors: *Tatham & Pym; Wilson, Bristows, & Carpmael; Jones & Starling; M. & H. Turner; J. B. Marsden.*

In re WEST OF ENGLAND BANK.
Ex parte BROWN.

FRY, J.
1879
June 28.

Winding-up—Creditor and Shareholder—Dividend on Debt—Judicature Act, 1875, *s.* 10.

A creditor of a banking company in liquidation who is also a shareholder in the company is entitled to receive a dividend on his debt if he has paid all the calls made upon him, and the law in that respect has not been altered by the 10th section of the *Judicature Act,* 1875.

Ante 755
22 Ch D 589

GEORGE BROWN, of *Barnstaple,* had sixty-five shares in the *West of England Bank* (registered under the Acts of 1862 and 1867 as an unlimited company), and when the order for winding up that bank was made he had a balance of £6611 on his current account with the bank. A call of £10 per share had been made and had been paid by him, and another call of £10 would become due on the 30th of June. The liquidators were paying to the creditors of the bank a dividend of 10*s.* in the pound, and an order had been made in Chambers for the payment to Mr. *Brown* of £3305, being a dividend at that rate after deducting the amount of the next call. The liquidators now moved to discharge that order.

Glasse, Q.C., and *Romer,* in support of the motion:—

Grissell's Case (1) no doubt decided that a creditor, though he was a shareholder, would receive a dividend, but the law has been altered by the 10th section of the *Judicature Act.* This is not a set-off, as in *Branwhite's Case,* before your Lordship on the 2nd of May, 1879(a)/*In re Albion Steel and Wire Company* (2) was merely a question of payment of rates, and has been explained by *In re Printing and Numerical Registering Company* (3). The Court is bound to give some meaning to sect. 10 of the *Judicature Act,* and the only meaning is that the rule in bankruptcy is to be followed as given in *Lindley* on Partnership (4).

Higgins, Q.C., and *Cozens-Hardy,* for Mr. *Brown,* were not called upon.

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(1) Law Rep. 1 Ch. 528.
(2) 7 Ch. D. 547.
(3) 8 Ch. D. 535.
(4) 4th Ed. vol. ii. p. 1322.

(a) See 4 M (1879) 86.

FRY, J.
1879
In re WEST OF ENGLAND BANK.
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FRY, J.:—

The question I have to determine in this case is whether a shareholder in the *West of England Bank*, who is also a creditor, is to receive his share of the dividend on his debt, he having paid all the calls which have been made upon him. I have made an order in Chambers that he shall so receive his dividend, and this present application is brought before me to discharge that order. I am very glad that the matter has been discussed, because of course I have had the benefit of an argument which I should not have had in Chambers.

Now *Grissell's Case* (1), which was before the Court of Appeal. consisting of the Lord Chancellor and the Lords Justices, is an authority to shew that, as the law stood in the year 1866, a creditor who was also a shareholder, and who had paid the calls made upon him, was entitled to be treated, as regards the reception of dividend, in the same manner as any other creditor. The Lord Chancellor there points out that the Act of 1862 appears to make no distinction between a creditor who is a member of the company and one who is not. He says (2): "There is nothing to be found in it to limit the meaning of the general word 'creditors.' On the contrary, the Act in various parts of it recognises members of the company as creditors. It will be sufficient to refer for proof of this to the seventh qualification in the 38th section, and to the 101st section. The Act would be a complete snare upon members of companies who are creditors if they were to be postponed to other creditors who are not members." His Lordship afterwards said: "The amount of the call being paid, the member of the company stands exactly on the footing of the other creditors with respect to a dividend upon the debt due to him from the company, The dividend will be, of course, upon the whole debt, and the member of the company will from time to time, when dividends are declared, receive them in like manner when either no call has been made, or, having been made, when he has paid the amount of it." Those are exactly the circumstances of Mr. *Brown*, whose claim is now in controversy; the only difference between the cases being, that in *Grissell's Case* the company was a limited company

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(1) Law Rep. 1 Ch. 528.

(2) Law Rep. 1 Ch. 535.

FRY, J.
1879
In re WEST OF ENGLAND BANK.
Ex parte BROWN.

and in the present case the company is an unlimited company But it has been very fairly admitted (the contrary could not be argued) that the case of an unlimited company is even more favourable to the placing of a creditor-shareholder in the same position as any other creditor.

Such was the law in 1866, and the question which has been argued is whether an alteration has been effected in that law by the 10th section of the *Judicature Act* of 1875. [His Lordship then read the words of the section which are material.] Three subject-matters are dealt with by that section, first, the respective rights of secured and unsecured creditors, which is not the question now in controversy; secondly, the debts and liabilities provable; and thirdly, the valuation of annuities and contingent liabilities. Now if any change has been effected for the purpose of the present proceedings, it is by the words "as to debts and liabilities provable," but what they precisely mean, and what the whole section precisely means, appear to me to be questions of some difficulty. The Master of the Rolls has said (1), "What the precise meaning of the section is, I think no one can positively say," and therefore I am not surprised that I have felt some doubt on the subject. But the conclusion at which I have arrived is, that the words "as to debts and liabilities provable" mean "as to what debts and liabilities may be proved," and that, therefore, the object and scope of this section is to allow everything which would be capable of being proved in a bankruptcy to be proved in a winding-up, whether it be strictly a debt or not. The Master of the Rolls, in the case of *In re Albion Steel and Wire Company* (2), has expressed the same opinion. He said there, "It appears to me that the right construction of the section is nothing more than this, that persons may in the winding-up of a company make such claims against the assets of the company as are provable under the law of bankruptcy. I see no reason for extending the words of the section beyond that." In the present case it is not disputed that a shareholder-creditor may prove, and the question before me is not as to his right of proof, but as to his right to receive dividends at the same time and *pari passu* with the other creditors That appears to me not to be within the words of the section as to

(1) 8 Ch. D. 538.

(2) 7 Ch. D. 547.

FRY, J.
1879
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debts and liabilities provable. In coming to that conclusion I bear in mind the very emphatic language of the Lord Chancellor, which points out that the Act of 1862 had in express terms given to shareholder-creditors rights similar to those possessed by other creditors, and I think I should be wrong in extending the somewhat obscure words of this 10th section so as to vary the rights of the shareholder-creditors.

The result is that I think the order I made in Chambers was right, and I must refuse this application; but, considering that the case is one of considerable difficulty, and that this course has been taken instead of adjourning the summons into Court, I think the official liquidator was quite justified in this application, and I shall allow the costs out of the estate.

Solicitors for Mr. *Brown*: *Clarke, Woodcock, & Ryland,* agents for *Chanter & Co., Barnstaple,*

Solicitors for Liquidators: *Clarke, Woodcock, & Ryland,* agents for *Fussell & Co., Bristol.*

FRY, J.
1879
May 28; *July* 1.

SYKES *v.* HOWARTH.

[1878. S. 196.]

Patent—Combination Patent—Agency—Infringement—Evidence—Particulars of Breach—15 *&* 16 *Vict. c.* 83, *s.* 41.

1 Ch D 729

A patent consisted of the application of cards or strips of leather covered with wire to rollers at "wide distances." A person who contracted to clothe rollers and supplied to a "nailer" cards of such width that when applied to the rollers they must of necessity leave wide spaces, and who himself paid the nailer, was held to have infringed the patent, though he alleged that his business was that of a cardmaker only, and did not include the nailer's work.

Semble, the conclusion would have been the other way if he had merely supplied the cards without making the nailer his agent.

Particulars of breach of a patent alleged divers sales between certain dates, and particularly to two persons. An answer of the Defendant admitted a sale to *H.*, a third person. Evidence of the transactions with *H.* was admitted.

THE Plaintiff in this action sued as patentee of improvements in fancy rollers of machines for carding wool and other fibres.

The cards referred to in the patent are strips of leather thickly studded with short wires, and the fancy roller is a roller the surface of which is either entirely covered by such cards, or partially so covered, the cards being fixed at regular intervals or spaces.

The Plaintiff's patent was dated the 2nd of November, 1877, and he thereby claimed that in lieu of covering the fancy rollers with card as heretofore, he constructs such rollers as follows:—"I attach to the periphery of the rollers longitudinal strips of card, the teeth of which are of tempered and hardened steel. The strips are placed at intervals, and by preference parallel to the axis of the roller, leaving wide spaces or blanks between or on each side of the several strips. In operation, the teeth or dents so made and arranged form truer and more regular gates or passageways between the teeth or dents on the card-covered cylinder, in connection with which such fancy rollers work . . . and by reason of the spaces or blanks between the several strips of cards and the rapid rotation of such rollers, an exhaust current of air is induced, the tendency and effect of which is to exhaust or draw out from the fibre being operated upon dirt and short waste fibre. . . . In addition to the ordinary use as fancy rollers, my improved rollers are applicable and employed for cleaning the card-covered cylinder."

Before this patent, the ordinary mode of cleaning the cards of the large cylinders was by means of a hand-scraper, and that was open to this disadvantage, that the person using it must stand on one side or other of the machine, and therefore he could not draw the scraper in an exact line with the gates of the cards, and the cards were liable in that way to get injured. At the conclusion of the specification the Plaintiff claimed, "firstly, the construction, application, and use of fancy rollers as herein described and illustrated in the drawings hereunto annexed, or any modification thereof; secondly, the construction, application, and use as a clearing roller of a roller such as herein described, that is to say, a roller having a strip or strips of wire" (by preference of hardened and tempered steel wire cord) "placed on the periphery of the said roller so as to leave a blank space or blank spaces as and for the purposes hereinbefore described."

The Defendant was charged with infringing this patent, and the case on which the Plaintiff mainly if not entirely relied for the purpose of proving such infringement, was the supply by the Defendant to a person of the name of *Hirst* of clothing for two fancy rollers at the end of 1877. The facts with reference to that, which were proved in the opinion of the Court, were shortly these, that in or about September or November, 1877, the Defendant, who is a card maker, entered into a bargain with Mr. *Hirst* to clothe with cards two sixty inch machines, which would include several of the fancy rollers. He was to receive £138 for so doing, and he received from Mr. *Hirst* the particulars of the cards required for each several roller on those two machines and amongst the rollers of which he received such particulars were two fancy rollers. The particulars given to him were that each of those "fancy rollers shall be clothed with eight rows of cards, each card being two inches in width." It was also proved that each of those rollers was of twelve inches diameter, and therefore about thirty-six inches in circumference, so that the thirty-six inches or thereabouts would be occupied by the eight cards and spaces—sixteen inches would be covered by the cards, and about twenty inches in all would be left to be occupied by the eight spaces, which would therefore be spaces of two and a quarter inches each.

It was further in evidence that the person who put the cards upon the fancy rollers was a nailer, who was paid by the Defendant, although selected and nominated by Mr. *Hirst*, the manufacturer; that the nailer would receive each set of eight cards in a separate packet, that each packet would be or was indorsed with a description for what roller it was intended, and that the nailer, as a matter of course, finding eight cards which would not cover the whole periphery of the roller, would proceed to divide that periphery into equal spaces or equal parts, and apply the cards accordingly, leaving each card and all the cards equally distant from one another and consequently leaving equal interspaces.

The Defendant proved that he as cardmaker was not in the habit of covering the fancy rollers with the cards which he has sold, nor did he fix or attach cards to fancy rollers. He was simply a cardmaker, and his duty began and ended with the making and selling the cards. That the manufacturer to whom the cards were sold employed the nailer to attach the cards to the rollers, and the trade of the nailer was entirely distinct and separate from that of a cardmaker. That the nailer worked according to the instructions of the manufacturer, and the cardmaker had no power to interfere in the attaching of the cards, or to control the nailer, but he admitted that the nailer sends in his account to the cardmaker, and is usually paid by him (though this custom was departed from occasionally by agreement), and that the cardmaker being well aware that he would have to pay the nailer's charges, indirectly recouped himself by fixing his prices at such amount as would cover payments made to the nailers.

The writ in the action was issued on the 18th of April, 1878.

The Plaintiff delivered particulars of breach in May, 1878, which stated that the Defendant had at divers times between the 29th of May, 1877, and the commencement of the action infringed the Plaintiff's patent by the manufacture or sale or use of fancy rollers, and in particular by fancy rollers manufactured and sold by or covered with cards by the Defendant for Messrs. *Shaw* and Mr. *Smith.* In July, 1878, the statement of defence was delivered. It stated, "The Defendant has made and sold to Messrs. *Samuel Shaw & Co.* and Mr. *Charles Smith* in the particulars of breaches in this action respectively mentioned, and to other persons certain cards (in all six sets) which were all 2¼ inches in width;" and the Defendant, in answer to interrogatories, disclosed the name of *Hirst* as one of the persons supplied with such sets of cards.

At the trial,

Aston, Q.C., and *Macrory,* for the Plaintiff, proposed to put in evidence entries in the books of the Defendant relating to the cards supplied to *Hirst.*

Webster, Q.C., and *Lawson,* for the Defendant, objected to any evidence being received in respect of *Hirst's* case on the ground that if the Plaintiff, having given particulars of breaches in respect of the specified persons, wished to rely on other cases he ought to have amended his particulars. They distinguished this case from *Hull* v. *Bollard* (1).

(1) 25 L. J. (Ex.) 304; 1 H. & N. 134.

FRY, J.:—

In this case I think I must admit the evidence tendered in respect of *Hirst's* case. It is said that in respect of those cases which are not mentioned by name in the particulars of breaches the Plaintiff cannot give evidence. It may be that the particulars were not sufficient, or tended to embarrass. But the Defendant did not apply for amended particulars, according to the case of *Hull* v. *Bollard* (1).

It appears to me I have to inquire what is the meaning of the particulars. I find the case of *Hirst* is within the literal meaning of the particulars. If I had found that the case of *Hirst* was likely to create surprise, or likely to introduce any point not raised by *Smith's* or *Shaw's* case, I should probably have given an opportunity to the Defendant to bring any fresh evidence. I have asked whether there is any witness not here whom the Defendants would desire to bring in respect of *Hirst's* case, and have received no satisfactory answer on that point, and must assume there is no such witness.

Aston, Q.C., and *Macrory*, for the Plaintiff:—

This invention is the proper subject of a patent: *Murray* v. *Clayton* (2). The Defendant is responsible for the infringement. The nailer is paid by him under the contract. He is clearly the tradesman who clothes the rollers with cards having wide spaces between them, which is the precise invention protected by the Plaintiff's patent: *Daw* v. *Eley* (3).

Webster, Q.C., and *Lawson*, for the Defendant:—

The nailer, though paid by the Defendant, was the agent of the manufacturer. A person who sells several articles to another to be used for infringing a patent does not thereby infringe the patent. In *Townsend* v. *Haworth* (4), which came before Sir *G. Jessel*, M.R., and afterwards before the Court of Appeal, the Plaintiffs had a patent for preserving vegetable substances from mildew by dipping them into a solution of certain chemical substances, and it was held that (1) a person who sold the component articles which entered into the patent with the knowledge that they were to be used for the purpose for which the patent was obtained could not be sued as an infringer of the patent, although he sold the articles with an indemnity from all consequences in reference to the patent. So here the Defendant sold the cards, but the manufacturer applied them to the rollers, and this is no infringement of the patent by the Defendant.

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(1) 25 L. J. (Ex.) 304; 1 H. & N. 134.

(2) Law Rep. 7 Ch. 570.

(3) Ibid. 3 Eq. 496.

(4) Unreported.

Fry, J., after referring to the portions of the specification set out in the report, continued:—

Shortly, the improvement claimed by the patentee is the intro-

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(1) The following extracts are from the shorthand writer's notes of the judgment of *Jessel*, M.R. (affirmed afterwards by the Court of Appeal), dated the 4th of March, 1875, in *Townsend* v. *Haworth* [1875 T. 15]: "The chief of these chemical substances are substances which are perfectly well known, and most of them are common substances; they are all old chemical compounds, and there is no claim in the patent at all except for the peculiar use of these chemical compounds for the purpose of preserving the cloth from mildew. No Judge has ever said that the vendor of an ordinary ingredient does a wrong if the purchaser coming to him says, 'I want your compound, because I want to preserve my cloth from mildew. I wish to try the question with the patentee.' No one would doubt that that sale would be perfectly legal." "You cannot make out the proposition that any person selling any article, either organic or inorganic, either produced by nature or produced by art, which could in any way be used in the making of a patented article can be sued as an infringer, because he knows that the purchaser intends to make use of it for that purpose." "What is every person prohibited from doing? He is prohibited from making, using, or vending the prohibited articles, and that, of course, includes in the case of machinery the product, if I may say so, of the machinery which is the subject of the patent. It is that which is produced by the patent. But has any one ever dreamt before this case that that extends to the component articles which enter into the patent? So far from that being the law, it has been decided that in cases of what they call combination patents it is only the combinations claimed that may not be used; the other elementary combinations may be used. No doubt there has been a good deal of litigation as to what were the combination claims, that is, whether in claiming the entire combination you claim the subsidiary combinations or not. . . . But you cannot even complain of the use of subsidiary combinations unless they are within the purview of your claim. The line of cases seems to me to shew conclusively that the mere making, using, or vending of the elements, if I may say so, which afterwards enter into the combination is not prohibited by the patent."

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17 Ch D 729

duction of wide spaces between the narrow cards, that is to say, the leaving of spaces between these cards which produce this exhaust current of air and make the roller operate better in performing the old function of a fancy roller; and in the second place the patentee describes the new office of cleaning which will be performed by that fancy roller in lieu of the old hand-scraper, and performed better than the old hand-scraper performed it.

[His Lordship then referred to the defence of want of novelty, and after considering the evidence of anticipation he held that this defence failed, and also that the invention was the proper subject of a patent on the principle of *Murray* v. *Clayton* (1); and after referring to the evidence mentioned in the report as to the manner in which the fancy rollers had been clothed by the Defendant, came to the conclusion that spaces of two and a quarter inches which would be left would unquestionably be wide spaces, and an infringement of the patent; and after considering the evidence as to the responsibility of the Defendant for the nailing on of the cards, he continued:—] I think the manufacturer would not, having given the order in the manner he had, and could not, rightly interfere with the nailing on of the cards; and I have come to the conclusion that the nailer must be deemed to have been the agent, for the purpose of nailing on, of the Defendant.

In coming to that conclusion I bear in mind this, that the contract into which he entered with Mr. *Hirst* was a contract to clothe the machine, and that he had not performed that contract until he had completed the clothing. That those were the exact terms of the contract appears both from the contemporaneous entry made by the Defendant in his book, and also from the verbal evidence which he gave before me.

It has been strongly urged before me that the act of the Defendant was not an infringement of the letters patent. To answer that question it is necessary to have recourse to the form of the letters patent themselves. The prohibiting part of the letters patent directs that no person except the patentee and those who derive title under him shall during the period of the existence of the patent "either directly or indirectly do, use, or put in practice the said invention." "Putting in practice" is evidently in the mind of the Crown something different from user, and I really do not know what could be "putting in practice" as contrasted with "using," if what the Defendant did in this case was not putting in practice the Plaintiff's invention. In my judgment, therefore, he either directly or indirectly made or put in practice the Plaintiff's invention.

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(1) Law Rep. 7 Ch. 570.

That being the conclusion at which I have arrived it follows, in my judgment, that the defence on the ground of the Defendant not having infringed the patent likewise fails. In what I have said I think there is nothing whatever at variance with the conclusion expressed by the Court of Appeal and by the Master of the Rolls in the case of *Townsend* v. *Haworth* (1); and I entirely agree, if I may say so, that selling articles to persons to be used for the purpose of infringing a patent is not an infringement of the patent. In this case it is totally different; there is a contract to clothe in the manner described by the particulars given to the Defendant, and that contract was carried into effect by a person paid by the Defendant, the Defendant himself receiving the total amount for which he contracted.

The consequence is that in my judgment all the defences fail, and a perpetual injunction must go in the usual terms.

Solicitor for Plaintiff: *J. W. Sykes.*
Solicitors for Defendants: *Learoyd, Learoyd, & Peace.*

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(1) Unreported. ante p 821 n (1)

FRY, J.
1879
July 7.

In re COLLISON.
COLLISON *v.* BARBER.

[1877 C. 158.]

Will—Construction—Legacy—Vesting—Gift over in case Legatee should die "before me or before the Division of my Estate.

13 Ch. D. 519.
18 Ch. D. 225
— 636

A testator gave his real estate and the residue of his personal estate to trustees, upon trust with all convenient speed after his death to sell and convert the same, and to hold the proceeds on trust to pay his debts and funeral and testamentary expenses, and, subject thereto and to the payment of an annuity, to divide the residue of the trust moneys into six equal parts, among two nephews and four nieces of the testator named in the will. He directed that the shares of the nephews should be paid to them as soon after his death as possible. He directed that the trustees should invest the shares of the nieces and pay the income thereof to them for their separate use. He directed that, in case any of his nephews should die before him, or before the division of his estate as before directed, his share should go over. And there was a similar direction with regard to the share of any of the nieces who should die before him, or before the division of his estate as before directed:—

Held, that the "division" of the testator's estate meant the expiration of twelve months from his death, and that the share of one of the nieces, who survived him but died within that period, went over.

PETER COLLISON, by his will, dated the 13th of September, 1873, gave and devised all his real estate to *Benjamin Barber* and *John Gibson* in fee, upon trust with all convenient speed after his decease to sell the same. And he gave and bequeathed all his personal estate and effects (not thereinbefore bequeathed) unto the same trustees absolutely, on trust with all convenient speed after his decease to call in and receive and convert the same into money. And he directed that his trustees should stand possessed of and interested in the moneys to arise from the sale of his real estate, and also of the moneys to arise from the sale or conversion of his personal estate, in trust thereout, in the first place, to pay, satisfy, and discharge all his just debts, funeral and testamentary expenses; and, subject thereto, and as to the residue of the said moneys, in trust to invest a sufficient sum to provide an annuity of £52 for *Maria Clark* during her life or until she should marry again; and, subject thereto, and as to the rest, residue, and remainder of his said trust moneys, upon trust to divide the same into six equal parts, unto and amongst his nephews, *T. C. Collison* and *Peter Collison*, and his nieces, *Janet Peters*, *Louisa Collison*, *Julie Collison*, and *Agnes Collison*. And he directed that the shares of his said nephews should be paid to them "as soon after my decease as practicable." And, with regard to the shares of his nieces, he directed that his trustees should invest the same and pay the income arising therefrom to his said nieces for their separate use. And he directed that in case any of his nephews should die before him, or "before the division of my estate as before directed," his or their share or shares, if he or they were married, should be invested by his trustees on trust for the benefit of his or their children. And in case either of his nephews should die "before me or before the division of my estate," without leaving issue, then the share or shares of such nephew or nephews should be equally divided amongst the remaining legatees of his will. And he directed that in case of any or either of his nieces dying "before me or before the division of my estate as before directed," being unmarried, or, if married, without leaving any child of their marriage, then the share or shares of such niece or nieces should be divided amongst the remaining legatees named in his will. But if any of his said nieces should die "before me or before the division of my estate" leaving issue of any marriage, then the trustees were to hold the share or shares of such niece or nieces on trust for the benefit of their children. And the testator appointed *Benjamin Barber* and *John Gibson* his executors.

The testator died on the 8th of December, 1875. The two nephews and four nieces named in the will survived him. *Agnes Collison* died on the 17th of April, 1876, without ever having been married. *Peter Collison* was her administrator. After the testator's death *Louisa Collison* married *Thomas Dunn*. The action was brought by *T. C. Collison* against the executors, for the administration of the testator's estate. On the 29th of March, 1877, an administration judgment was made, directing accounts and inquiries to be taken and made. By the Chief Clerk's certificate it appeared that the executors had received personal estate

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to the amount of £6255 4*s.* 3*d.*, and had paid on account thereof £341 16*s.* 1*d.* The certificate found that all the testator's debts had been paid. The testator's real estate was sold on the 9th of February, 1876, by the trustees for £780. The purchase-money was not received until the 8th of April, 1876. The debts of the testator were not all paid until September, 1876. The first payment made by the executors by way of distribution of the trust fund was in October, 1876.

This was an adjourned summons for the further consideration of the action.

North, Q.C., and *J. T. Humphry*, for the Plaintiff:—

By the "division" of his estate the testator must be taken to have meant the period of twelve months allowed by law for the division, and as the niece *Agnes Collison* died before the expiration of that time and unmarried, her share went over to the other nephews and nieces: *Hutchin* v. *Mannington* (1); *In re Arrowsmith's Trust* (2); *Sitwell* v. *Bernard* (3); *Elwin* v. *Elwin* (4); *Faulkener* v. *Hollingsworth* (5); *Gaskell* v. *Harman* (6); *Bernard* v. *Mountague* (7); *Law* v. *Thompson* (8); *Martin* v. *Martin* (9); *Whitman* v. *Aitken* (10); *Minors* v. *Battison* (11). The fact that the purchase-money of the real estate was received before the death of *Agnes Collison* cannot alter the right of the executors to postpone the distribution of the estate for twelve months after the death of the testator, if they should think fit for proper reasons so to do, though, of course, they could not alter the rights of the legatees by a wilful omission to divide the property.

Bardswell, for Mr. and Mrs. *Dunn*.

R. Swan, for *Janet Peters*.

Whitehorne, for the trustees.

(1) 1 Ves. 366.
(2) 29 L. J. (Ch.) 774; 2 D. F. & J. 474. 6 Jur. N.S. 1232 Feb 9
(3) 6 Ves. 520.
(4) 8 Ves. 547.
(5) Cited 8 Ves. 558.
(6) 6 Ves. 159; 11 Ves. 489.
(7) 1 Mer. 422.
(8) 4 Russ. 92.
(9) Law Rep. 2 Eq. 404.
(10) Ibid. 414.
(11) 1 App. Cas. 428.

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Higgins, Q.C., and *Cottrell*, for the administrator of *Agnes Collison*:—

The interests of the nephews and nieces were vested at the death of the testator; the words which are relied on as providing for a divesting are too indefinite to have any legal operation. The principle of *Hutchin* v. *Mannington* (1) is in our favour, and the case was recognised as an authority by the House of Lords in *Minors* v. *Battison* (2). *Martin* v. *Martin* (3) is also a clear authority for us. *In re Arrowsmith's Trust* (4) is distinguishable. Other authorities in our favour are *West* v. *Miller* (5); *Whiting* v. *Force* (6); *In re Dodgson's Trust* (7). At any rate *Agnes Shirley* was *de jure* entitled to her share of that part of the estate which was realized before her death. The assets were much more than sufficient to pay the debts, and it was the duty of the executors, having regard to the divesting clause, to divide as soon as possible that part of the estate which they had realized.

FRY, J., after stating the provisions of the will and the events which happened, continued:—

The question depends on the construction of the words "die before me or before the division of my estate." Six different possible constructions have been suggested of the term "division" of the testator's estate—1, the time of the testator's death; 2, the expiration of the year fixed by law for the division of a testator's personal estate; 3, the actual time of the division of that part of the estate which was first divided; 4, the actual time of the complete division of the estate; 5, the time when the division of a part first became practicable; 6, the time when the division of the whole first became practicable. It is clear that the personal representative of the deceased niece can only take the share given to her, if it vested absolutely either on the death of the testator, or on the division of the whole or a part of the estate becoming practicable before her death. In my opinion the first construction suggested cannot be maintained, and for this plain reason, that

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(1) 1 Ves. 366.
(2) 1 App. Cas. 428.
(3) Law Rep. 2 Eq. 404.
(4) 2 D. F. & J. 474. 7 Jur N.S. 9.
(5) Law Rep. 6 Eq. 59.
(6) 2 Beav. 571.
(7) 1 Drew. 440.

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the testator has referred to two events, his own death, and the division of his estate, and if I can I must give a different meaning to those two expressions. In my opinion the "division" of the estate means the period allowed by law for the division, that is, the expiration of twelve months after the testator's death. I must give some meaning to the words, and I think that is a reasonable meaning, and one which does not leave it to the caprice of the trustees to fix when the vesting or divesting of the shares shall take place. I ought also to give a convenient interpretation to the words, and I think I do so by interpreting them to mean the expiration of twelve months after the testator's death. I adopt the reasoning of Vice-Chancellor *Kindersley* in *In re Arrowsmith's Trust* (1). The reason why I reject the actual time of division is to be found in *Martin* v. *Martin* (2) and *Minors* v. *Battison* (3). In the latter case Lord *Selborne* said (4), "It was decided in *Hutchin* v. *Mannington* (5) and *Martin* v. *Martin* that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect. Lord *Thurlow* said, in the former of those cases, that it would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell; that in some way the property might be sold immediately; that the Court would not inquire when a real estate might have been sold with all possible diligence, but always in such a case considered it as sold the moment the testator was dead (there the trust for sale came into operation on the death of the testator); that where there is a trust, that is always considered in equity as done which is ordered to be done; and that the Court cannot measure the time." If that be so, it follows that I must reject the actual time of division of a part or the whole of the estate, and, if I must reject the time of the actual division as being too uncertain, the time when any part of the estate might have been divided is *à fortiori* too uncertain: and though there is some authority for directing an inquiry when a division of the estate might have been made, it would be very difficult to do so after

(1) 29 L. J. (Ch.) 774. 6 Jur ns 1231
(2) Law Rep. 2 Eq. 404.
(3) 1 App. Cas. 428.
(4) Page 452.
(5) 1 Ves. 366.

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Minors v. *Battison* (1). Moreover, the decision in *Hutchin* v. *Mannington* (2) proceeded on the extreme difficulty of deciding whether a thing might or might not have been done. I should be directing an inquiry of the description which Lord *Thurlow* rejected in that case, and such as the House of Lords, in *Minors* v. *Battison*, held ought not to be directed. Moreover, the law, in fixing the expiration of twelve months from the death of the testator as the period for the division of his estate, has fixed it as the period before which presumably a division could not be made, and it must rest with those who say that a division might have been made earlier to adduce evidence that it could. So far as the evidence goes in the present case it shews the contrary. The purchase-money of the real estate was not received till nine days before the death of *Agnes Collison*; the testator's debts were not all paid until September, and there is nothing to shew that the trustees were not using due diligence. On that ground, independently of any other, I should reject the presumption that the estate could have been divided at any earlier period than the expiration of the twelve months. The result is that I hold that the share of *Agnes Collison* has gone over to the other nephews and nieces.

Solicitors: *Torr & Co.; Burton, Yeates, & Hart; Pattison, Wigg, & Co.; Iliffe, Russell, & Co.; G. S. & H. Brandon.*

BROCKLEBANK *v.* EAST LONDON RAILWAY COMPANY.

[1878 B. 529.]

FRY, J.
1879
July 15.

18 Ch D 455

Receiver—Application for Payment by Stranger to Action—Locus Standi—Jurisdiction.

A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands.

Neate v. *Pink* (3) explained.

THIS action was brought by holders of debenture stock charged on the undertaking of the Defendant company, claiming an account of what was due to them for dividends or interest on their debenture stock; payment of what should be found due out of the undertaking of the company and the rates, tolls, and sums of money arising by virtue of their special Acts; the appointment of a receiver; and an injunction. On the 14th of November, 1878, an order was made appointing a receiver of the undertaking of the Defendant company and of all the tolls and sums of money arising by virtue of their Acts, and of all the estate, right, title and interest of the company in the same, and of all the property of what kind soever included in the charges made in favour of the debenture stockholders of the company and subject thereto. And it was ordered that the receiver should out of the moneys to be received by him pay all expenses proper and necessary for the maintenance, management, and working of the undertaking, and any party was to be at liberty to apply as to any payments to be made by the receiver, and generally as he might be advised.

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(1) 1 App. Cas. 428.
(2) 1 Ves. 366.
(3) 15 Sim. 450; 3 Mac. & G. 476.

By an agreement dated the 17th of December, 1869, and made between the Defendant company and the *Great Eastern Railway Company*, it was agreed that it should be lawful for the Defendant company to make, and that the *Great Eastern Company* would permit, a junction with the line of the *Great Eastern Company* at or near *Brick Lane*, at a point to be settled by the engineers of the two companies. The *Great Eastern Company* were to acquire the necessary land, and to grant to the Defendant company an easement in or right of using such land for the purpose of constructing their railway between the main line of the *East London Railway* and the said point of junction. The Defendant company were to pay to the *Great Eastern Company* for such easement or right of making their railway on land of the *Great Eastern Company* an annual rent of £400. The *Great Eastern Company* were to provide for the exclusive use of the Defendant company a single line of rail on their railway from the junction with the *East London Railway* to the station at *Liverpool Street*. The Defendant company were to pay the junction expenses. The Defendant company were also to pay to the *Great Eastern Company*, for or in respect of the user of the line between the said point of junction and the commencement of the station, a toll, as for double the actual distance, less 10 per cent. for locomotive power and vehicles, such toll not being in any year below £5000. On the 17th of February, 1879, the *Great Eastern Company* recovered judgment, in an action brought by them in the Chancery Division against the Defendant company, for £800, being two years' rent in respect of the easement; £415 4*s.* for junction expenses; and £10,000 for two years' toll under the agreement.

On the 5th of June, 1879, the *Great Eastern Company* took out a summons in the action of *Brocklebank* v. *East London Railway Company*, asking that the receiver might be directed, out of the moneys in his hands, to pay to the *Great Eastern Company* the sums of £800, £415 4*s.*, and £10,000, for which they had recovered judgment in the other action, and also some other sums which they alleged to be due to them by the Defendant company under the agreement of the 17th of December, 1869, all which sums the applicants alleged to be due from the Defendant company as and for expenses proper and necessary for the maintenance, management, and working of the undertaking of the Defendant company.

J. Pearson, Q.C., and *N. R. Smart*, for the *Great Eastern Railway Company*.

Glasse, Q.C., and *Cozens-Hardy*, for the Plaintiffs, objected that as the *Great Eastern Company* were not parties to the action, they had no *locus standi* to make the application, and the Court had no jurisdiction to make the order.

J. Pearson, Q.C. :—

The effect of the agreement of December, 1869, is to make the *East London Company* tenants of the *Great Eastern Company* in respect of the easement thereby granted at the rent thereby agreed upon. The Court by its officer, the receiver, is now using the easement. The order appointing the receiver directs him to pay all proper and necessary expenses. Our rent is a proper and necessary expense; the receiver could not make his profits without the use of our property. *Neate* v. *Pink* (1) is an authority for ordering the receiver to pay what is due to us.

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(1) 15 Sim. 450.

[FRY, J. :—In that case the receiver had taken possession of an estate which was not included in the order appointing him. A wrong had been done by him in which all the parties had acquiesced.]

The present case is even stronger. The Defendants are using our property without paying for it. We have done all we can to enforce our rights by recovering judgment in the other action. We cannot reap the fruits of it in any other way than by this application. If a receiver was appointed in an administration suit, and he was directed to keep down annuities bequeathed by the testator's will, could not the annuitants, even if they were not parties to the suit, apply in it for payment of their annuities if the receiver did not pay them?

[FRY, J. :—An administration decree is a decree for the benefit of all the persons who are interested in the testator's assets.]

Wastell v. *Leslie* (1) is distinguishable from the present case. *Claydon* v. *Finch* (2) shews that.

FRY, J. :—

The action in which this summons is taken out is brought by debenture stock holders, against the Defendant company, and the receiver has been appointed in that action. He is therefore receiver for the purpose and for the benefit of the debenture stock holders, who claim to have a charge on the undertaking of the company in the ordinary way. [His Lordship read the order appointing the receiver.]

The applicants put their case, in effect, upon two grounds. In the first place, they say that the sums which they claim are expenses proper and necessary for the working of the undertaking of the Defendant company, and that, therefore, they ought to be paid them by the receiver.

I will assume that they are expenses proper and necessary for the working of the undertaking, and that the receiver has funds to pay them. If so, undoubtedly it is at his own peril, as between him and the parties to the action, that he does not pay them. But it is said on the part of the Plaintiffs, and I think rightly, that such an order gives no right to every person to whom the receiver may owe money for expenses, still less to every person to whom the company may owe money for expenses, to come and ask for payment of his claim, *brevi manu*, out of the funds in Court, the produce of the profits received by the receiver. It is evident that if such a construction could be given to the order, it would be somewhat extraordinary that liberty should be expressly given to the parties to the action to apply as to any payments to be made by the receiver, because then every person but the parties to the action would be entitled to apply without having liberty expressly given to him. Such a construction would lead to great inconvenience; and it is certainly, according to my view, not the proper construction to be put on such an order. The parties have liberty to apply in order that the receiver, if he is not doing his duty, may be called to account by any of them, but third persons have no right to be judges of the directions given to the receiver. I think the inconvenience of holding otherwise would be very great indeed.

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(1) 15 Sim. 453, n.

(2) Law Rep. 15 Eq. 266.

Then it is said, in effect, that the claimants have a lien upon the profits produced by the Defendants' railway. This has been suggested, though in terms Mr. *Pearson* has avoided putting his argument in that form. It seems to me clear that, according to the law of *England*, a person who grants an easement to another, or grants a lease of land to another, has no lien on the profits derived from the use of that land or that easement by the person who is in possession of it. In the one case there may be a right of distress, in the other case there may be none. But whether there is a right of distress or not, it is, in my view, equally clear that no lien arises on the profits derived from the use of the easement or the demised land.

Therefore it appears to me that the present applicants have no specific right in the funds in Court. Further than that, it is to be observed that their claim is not against the receiver in any proper sense, but against the company in respect of a judgment which has been recovered against them. With that judgment I am not in any way interfering by rejecting the present application.

The next argument is based on the case of *Neate* v. *Pink* (1), which, it is said, is an authority compelling me to entertain this claim. That was a very peculiar case, and its very peculiarity seems to me to indicate that there is no such general rule as has been insisted upon. There the suit was instituted by some persons who were entitled under the will of *John Hiatt*, who was the owner of one moiety of a plantation in *Jamaica;* the other moiety belonged to two persons named *Fletcher* and *Yates*. Receivers and managers of the testator's estates had been appointed by the Court; proceedings were taken in the Court of Chancery in *Jamaica* to give effect to the proceedings in the suit in this country, and the receivers who had been appointed by the Court in this country were let into possession of the testator's moiety of the plantation, and took possession of the other moiety also. They made profits on their reception of both moieties, and therefore the fund which was in Court resulting from the working of the plantation represented, as to some portion of it, property which the receivers had no right whatever to receive, and in respect of which there was a perfectly good equitable claim on the part of the owners of that property to be repaid. The persons against whom they had that right were officers of the Court, who had, in effect, under the direction or acquiescence of the Court, entered on the property. They had in another action been found to be liable to *Fletcher* and *Yates* in respect of the use and occupation of their moiety, and, being so liable, they were entitled under the circumstances to an indemnity out of the fund in Court. The Court took a short course, and gave to the persons who had a right against the receivers, a right against the fund out of which the receivers were entitled to an indemnity. That case was determined upon its very special circumstances, as is apparent from one passage in the judgment of Lord *Cottenham* when it came before him on appeal (1). He said, "When I consider that the occupation of the *Byndloss* moiety was in itself a fair transaction, and one which appears from what the Master has found to have been beneficial to the trust estate of *John Hiatt;* that it was entered into by the receivers, who are the officers of the Court; that the parties not under disability were apprised of and acquiesced in it; that it was never opposed on behalf of any of the parties who were under disability; that it was in a manner sanctioned by the Court of Chancery in *Jamaica*, in a suit which was ancillary to the suit in this Court; I am of opinion that the transaction is binding on the parties interested in the trust estate." The very language in which the judgments of the Vice-Chancellor and the Lord Chancellor are couched indicates that there is no general principle giving to every person who is interested in having money paid to him by a receiver a right of access to the Court in the way contended for by Mr. *Pearson*.

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(1) 15 Sim. 450.

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(1) 3 Mac. & G. 476, 484.

FRY, J.
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I think, therefore, that I am bound to allow the preliminary objection, and to dismiss the summons with costs.

Solicitor for *Great Eastern Railway Company: C. A. Curwood.*
Solicitors for Plaintiffs: *Wilson, Bristows, & Carpmael.*

MURRAY *v.* MILNER.

[1875 M. 93.]

FRY, J.
1879
July 15.

Evidence—Admissibility—Pedigree—Illegitimacy—Declaration by Deceased Parent.

28CLD1/5

In a case of pedigree the declaration of a deceased father is admissible evidence of the illegitimacy of his child when the question in dispute is whether the father and mother were ever married.

And such a declaration may outweigh evidence shewing that the father and mother were reputed to be husband and wife.

Goodright v. *Moss* (1) followed.

THIS was an action to administer the estate of *John Murray*, late of *Matterdale, Cumberland*, who died intestate on the 28th of October, 1873. He left no children. The Plaintiff was his widow. The Defendants were his second cousins once removed, being the children of *Eliza Milner* (formerly *Murray*), the wife of *John Milner*. She was a daughter of *Jonathan Murray*, who was the youngest brother of *Thomas Murray*, the father of the intestate. The Defendants proved their pedigree, and claimed to be the next of kin of the intestate; *C. H. Milner*, one of the Defendants, claiming to be the heir-at-law.

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(1) 2 Cowp. 591.

Advertisements were issued calling upon any other persons who claimed to be heir-at-law or next of kin of the intestate to come in and establish their title. A claim was, in June, 1877, carried in by one *John Murray*, of *Stepney*, who alleged that he was the only surviving legitimate child of *John Murray*, of *Ratcliff Highway*, who died in 1834, and who was the second brother of *Thomas Murray*, the father of the intestate. *John Murray*, of *Stepney*, therefore, claimed to be first cousin to the intestate, and to be his heir-at-law and sole next of kin, other than his widow. The claimant died on the 9th of August, 1877, and the claim was continued on behalf of his executors. The Chief Clerk certified that the Defendants were the next of kin of the intestate living at his death, and that the Defendant *C. H. Milner* was his heir-at-law. The executors of the claimant took out a summons to vary the Chief Clerk's certificate.

The main question was whether the father and mother of the claimant had ever been married. In support of the claim there was evidence that his father and mother were reputed to be husband and wife. The father, by his will, dated the 2nd of May, 1833, bequeathed an annuity of £52 to the claimant by the description of "my son or reputed son commonly called or known by the name of *John Murray*." By the same will the father also made provision for two daughters (who were his children by another mother, and who were admitted to be illegitimate), describing them as "my two daughters or reputed daughters that I had by *Elizabeth Farmer*, commonly called or known by the names of *Emma Murray* and *Ellen Murray*." He also in the same will made provision for the children of a third daughter (by the same mother), describing the daughter as "my daughter or reputed daughter *Albina*."

Higgins, Q.C., *Hubert Lewis*, and *Chadwyck-Healey*, for the summons.

B. B. Rogers, and *J. Henderson*, for the Defendants, proposed to use the will of *John Murray* of *Ratcliff Highway* to prove the illegitimacy of the claimant.

Higgins, Q.C., objected that the declaration of a father could not be admitted for the purpose of bastardizing his own child: *Taylor* on Evidence (1).

B. B. Rogers:—That rule only means that a father cannot be heard to say that issue born of his wife after marriage is illegitimate. Here the question is whether the father and mother were ever married. There is evidence that they were reputed to be husband and wife, but that evidence comes to nothing when the father himself speaks of the son as his reputed son.

FRY, J., referred to *Goodright* v. *Moss* (2).

Higgins, in reply:—

In order to admit the evidence it must be assumed that there was a marriage, otherwise the declaration is that of a stranger, which would not be admissible at all.

Glasse, Q.C., and *E. Cutler*, for the Plaintiff.

FRY, J.:—

The question I have to determine is the validity of the claim, made originally by *John Murray*, of *Stepney*, and subsequently continued by his executors, to be next of kin and heir-at-law to *John Murray*, the intestate.

Upon that claim three questions have arisen for decision. The first is, whether *John Murray*, of *Ratcliff Highway*, was the uncle of the intestate? On the evidence, I come to the conclusion that he was.

The next question is this, Was *John Murray*, the claimant, the son (I do not say the legitimate, but the natural son) of *John Murray*, of *Ratcliff Highway?* By natural I mean actual, whether legitimate or illegitimate. In my opinion it must be found that he was.

Then arises the third question, which is this: Was *John Murray*, of *Ratcliff Highway*, married to the mother of the claimant? A great deal of evidence has been adduced on the part of the claimant which, if it stood alone, would be very strong and cogent evidence to shew that his father and mother were married folk. According to the evidence of one old woman, the woman who was undoubtedly the mother of the claimant was spoken of by the father as Mrs. *Murray*. According to the evidence of other witnesses, they heard her spoken of by other persons in his presence as Mrs. *Murray*. There is evidence that they went to church habitually, which probably would be more natural for lawful married folk than for a man and his mistress, and there is evidence that scandal was caused in the neighbourhood by the intrusion of another woman into the family, a thing which would be more natural in the case of a mistress ousting a lawful wife than in the case of one mistress competing with another. Further than that, there is evidence of considerable respect shewn by the neighbours to the woman on the occasion of her funeral. But, on the other hand, on the part of the Defendants there is evidence of a cogent description. In the first place, there is the evidence of *Sarah Murray*, a member of the family, that according to the family repute *John Murray*, of *Ratcliff Highway*, was never married. But the most cogent piece of evidence is, in my judgment, his own will. Then, in addition to this, there is to be borne in mind that two of the natural daughters of *John Murray*, of *Ratcliff Highway*, are still living, who might have been called to speak to the different manner in which the legitimate son was treated from the bastard daughters, and they were not called before me. Of course, the burden of proof rests on the man who makes the claim.

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(1) 7th Ed. vol. i. p. 542.

(2) 2 Cowp. 591.

Lastly, it appears to me that the evidence of reputation is not clear and uniform, but shews that there was some doubt in the minds of the persons amongst whom the reputation is said to have existed. Weighing the one class of evidence against the other, observing that the one class consists of not very clear evidence from very old persons, some of them too old for cross-examination, and in a position in life in which they are not likely to speak with very great exactitude of past events; while on the other hand there is the declaration made by the person who of all others must have known most about the matter, on so serious and important an occasion as the disposition of his property among the members of his family, and made when the matter was, comparatively speaking, fresh in his recollection, I feel myself bound to come to the conclusion that the claimant has not succeeded in making out that affirmative proposition, the burden of which rested upon him.

It has been argued that the will is not capable of being looked at as a declaration by the deceased father of the claimant, because it is said you must either admit the marriage before you can shew that there is any relationship between the declarant and the claimant, or you must deny the existence of the relationship, and then it would be the declaration of a mere stranger. In my judgment that argument cannot prevail. It would lead to great difficulty. As long ago as *Goodright* v. *Moss* (1), decided by Lord *Mansfield* in 1777, it was determined that general declarations are good evidence after the death of a parent to prove that a child was born before marriage. In that case the Court of Queen's Bench applied the rule, and Lord *Mansfield* pointed out that declarations of parents in their lifetime were admissible, and said (2): "I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard *eigné* and the subsequent marriage, to prevent controversy in the family touching the inheritance. If the credit of such declarations is impeached, it must be left to the jury to judge of," clearly holding that such declarations are admissible.

It has been attempted to say that this evidence cannot be admitted, because the ground of illegitimacy might be want of access after marriage. But the rule of law which rejects such declarations can only apply after the marriage itself has been proved, and that is the very thing in controversy here. Accordingly Lord *Mansfield* laid down the rule in this way (2): "It is a rule, founded in decency, morality, and policy, that they" (that is, the parents) "shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party." Such a rule, therefore, has nothing to do with a case in which the question is marriage or no marriage.

Solicitors for Plaintiff: *Kynaston & Gasquet.*
Solicitor for Claimant: *W. R. Haward.*
Solicitors for Defendants: *Glynes, Son, & Church.*

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(1) 2 Cowp. 591.

(2) 2 Cowp. 594.

FRY, J.
1879
July 17.

In re REGENT UNITED SERVICE STORES.
Ex parte BENTLEY.

Companies Act, 1867, s. 25—*Money credited to Shareholder—Equivalent to Cash Payment—Costs.*

14 Ch D 404

Where an agreement was entered into between a company and one of its directors that, in consideration of his giving up certain benefits, the director should receive a sum of money equal to three-fourths of the amount paid up by him upon his shares, and that sum was credited to him in the books of the company in pursuance of the agreement:—

Held, that the amount so credited to the director was equal to a cash payment by him within the meaning of the 25th section of the *Companies Act*, 1867; and that there was nothing fraudulent or improper in such an agreement being entered into.

THIS was an adjourned summons in the winding-up of the *Regent United Service Stores* on the application of *W. W. Bentley* for an order that the Chief Clerk's certificate might be varied by striking out the name of *W. W. Bentley* as a shareholder and contributory for 425 shares in the company.

This company was originally called the *Provident Supply Association*, and the name was afterwards changed to *The Regent United Service Stores.* The articles of association were dated the 18th of November, 1874; and by those articles Mr. *Bentley*, who was the projector of the association, was appointed consulting director, and was to receive a commission of one-half per cent. upon the gross sales when they should exceed £100,000, and he was to take 100 shares of £5 each. On the 19th of January, 1875, an agreement in writing was executed between Mr. *Bentley* and the company for the purpose of carrying out more formally the provisions of the articles of association with such modifications as had been arranged between the parties. The 14th article of that agreement was as follows:—

"14. Mr. *W. W. Bentley*, as the projector of this association on the special principles on which it is founded, is, in consideration thereof, hereby appointed consulting director to the company upon the following terms and conditions, and the directors are hereby authorized and empowered to carry the same into effect, viz. :—

"(*a*) In addition to all the rights, privileges and emoluments of an ordinary director, he shall have a commission of one-half per cent. upon the gross sales of the company, when and so soon as they exceed the rate of £100,000 per annum, and such commission shall be payable half-yearly, commencing from the first day on which the first store of the company shall open for business. But shall not be paid or payable for any half-year when the gross returns are less than £50,000, nor for any half-year in which the dividends of 6 per cent. per annum herein prescribed shall not be paid to the members for that half-year.

"(*b*) Until the capital of £300,000 is fully subscribed, the said commission shall be paid in fully paid shares of the company at par, one-third thereof preference and two-thirds thereof provident, but all payment of dividends shall be deferred thereon until dividends at the rate of 6 per cent. per annum shall be paid for one year on all the other shares then entitled.

"(*c*) After the said capital is fully subscribed, all subsequent payments shall be made in cash, but the rate of commission shall thenceforth be reduced to one-quarter per cent. in lieu of the aforesaid half per cent.

"(*d*) He shall, for the considerations aforesaid, be entitled to the said emoluments, and to retain the said appointment upon the aforesaid terms and conditions so long as he shall be willing to give the advantages of his advice and experience for the welfare of the company, and to give all due and proper attention to the affairs of the company as such consulting director. The said *W. W. Bentley* shall apply for and take at least 100 shares in the company as a further consideration for the said appointment."

In March, 1876, Mr. *Bentley* had become a holder of 300 shares in the company, and the company, being then in a fairly satisfactory position, were desirous of reducing the amount payable to Mr. *Bentley*, and an agreement was entered into between him and the company, dated the 10th of March, 1876, by which Mr. *Bentley* gave up the position of consulting director, and became an ordinary director liable to retire in rotation, and he also gave up the commission to which he was previously entitled, and in lieu thereof he was in future to be entitled to a quarter per cent. on the gross returns when they should exceed £100,000 per annum, and he was to take fifty more shares in the undertaking, and by clause 9 it was agreed as follows:—

"*W. W. Bentley* having taken an additional fifty shares in the said association, making a total of 350 shares so taken by him, upon which he has paid £218 15*s.*, the said association, in consideration of the aforesaid modifications agreed to by the said *W. W. Bentley*, hereby agrees to credit him in the books of the association with the sum of £750 as being paid upon such 350 shares in the following manner, namely, at the date of the registration of this agreement, with a sum equal to three-fourths of the amount then paid up on the said shares. And from thenceforth, when and as the said *W. W. Bentley* shall make any payments on the said shares, he shall be credited with a like proportion of three-fourths of the amounts paid by him until the amounts so credited to him shall in the aggregate amount to the said sum of £750. The said *W. W. Bentley* hereby agrees to pay up the amount remaining due (namely, £781 5*s.*) on the said shares by the regular quarterly instalments provided by the said articles of association, commencing from the 15th day of April next, upon which day the said *W. W. Bentley* shall pay the first instalment of £43 15*s.*, and shall continue paying the same every three months therefrom. And in case of default all the provisions of the said articles as to forfeiture shall apply thereto."

The shares in the association which were originally £5 shares were in January, 1877, reduced to £1 shares, and Mr. *Bentley* consequently became the holder of 1750 shares.

From the accounts kept by the company it appeared that as a holder of £1750 £1 shares Mr. *Bentley* had paid by instalments, up to the 9th of August, 1877, £481 5*s.*, leaving a liability of £1268 15*s.* He subsequently transferred 1325 of these shares, subject to the unpaid liability, which was £930 12*s.* 6*d.*, thus leaving £338 2*s.* 6*d.* as his remaining liability upon the shares retained by him.

Mr. *Bentley* then claimed under the 9th clause of the agreement of the 10th of March, 1876, a credit of £360 18*s.* 9*d.*, being three-fourths of the £481 5*s.*, and this claim was admitted by the ompany in a letter addressed to Mr. *Bentley* on the 14th of August, 1877, wherein he was informed that £360 18*s.* 9*d.* had been passed to his credit in the books of the company in conformity with the agreement of the 10th of March, 1876.

It also appeared, upon an inspection of the books, that this sum of £360 18*s.* 9*d.* had in fact been placed to the credit of Mr. *Bentley* in the private ledger and in the company's journal, where it was described as three-fourths of £481 5*s.* which had been paid by him up to that date.

Burton Buckley, in support of the application:—

By the contract of March, 1876, Mr. *Bentley* gave up what then appeared a valuable interest in reversion, and the contract was confirmed by the shareholders at a general meeting, and was entered into, not at Mr. *Bentley's* suggestion, but at the suggestion of the members of the company. The shareholders could not therefore be injured by it, and the only persons who could be injured would be creditors of the company; but at the date of the agreement there were no creditors to whom anything was due. Mr. *Bentley* was entitled to the credit of £360 18*s.* 9*d.* the same as if he had paid it in cash, and he could at any time have enforced the credit under the terms of the agreement, which was not *ultrà vires,* as the directors had power to buy up the debts or claims of the company: *Buckley* on the Companies Acts (1). These credits were in fact placed to the account of Mr. *Bentley* in the books of the company. The money was legitimately coming to him as compensation for giving up a beneficial contract, and the effect was to discharge him from all liability in respect of the remaining shares held by him. This brings the case within *Adamson's Case* (2), *White's Case* (3), *Maynard's Case* (4), and *Ferrao's Case* (5), which were in conformity with the principle laid down in *Spargo's Case* (6).

Higgins, Q.C., and *Bardswell,* for the liquidator:—

First we say that the agreement of the 10th of March, 1876,

(1) 3rd Ed. p. 445.

(2) Law Rep. 18 Eq. 670.

(3) 10 Ch. D. 720.

(4) Law Rep. 9 Ch. 60.

(5) Ibid. 355.

(6) Ibid. 8 Ch. 407.

was void as being fraudulent and improper, and the directors had no power to enter into such a contract. *Bentley* was the ostensible owner of the shares, and was liable to the creditors of the company, who could know nothing of the private arrangement between him and the directors; and as the agreement was not registered under the 25th section of the *Companies Act*, 1867, it could not prevail against the creditors: *Fothergill's Case* (1). Nothing but payment in cash is sufficient to relieve a shareholder of his liability. What was done here did not amount to payment in cash; it was the cancellation of a debt, and was substantially an allotment of paid-up shares. The documentary evidence is all that can here be relied upon, and there is nothing to shew that the money was ever actually paid, and the mode of set-off is inconsistent with the terms of the agreement. There can be no set-off on the part of *Bentley* for the amount alleged to be due to him: *Black & Co.'s Case* (2). In *Spargo's Case* (3) the account between the company and the shareholder was balanced by a cash payment, and therefore the transaction came within the 25th section of the *Companies Act*.

FRY, J.:—

Three questions have been argued or suggested in the course of the discussion before me upon this case. The first and most important question is this, whether under the circumstances, which are not in dispute, Mr. *Bentley* has paid up the entire amount due upon 425 shares which were standing in his name at the time of the liquidation of the company. Now what happened is shortly this. He was promoter of the company, and under the articles of association and an agreement of the 19th of January, 1875, he became entitled to a certain commission of ½ per cent. upon the gross sales in the event of the sales exceeding £100,000 per annum; and he agreed to take 100 shares. Those shares were subsequently increased by agreement between himself and the company or the directors to 350. In the following year, 1876, a new agreement was entered into. The short effect of that was this, that he agreed to give up his contingent commission of ½ per cent. and to accept in lieu of it a contingent commission of ¼ per

(1) Law Rep. 8 Ch. 270.

(2) Law Rep. 8 Ch. 254.

(3) Law Rep. 8 Ch. 407.

cent., and the company agreed to credit him in the books of the association with the sum of £750 as being paid upon his 350 shares, in the following manner: that at the date of the registration of the agreement a sum equal to three-fourths of the amount then paid up on the shares should be credited, and that from thenceforth, when and as *Bentley* should make any payments on his shares, he should be credited with a like proportion of three-fourths of the amount paid by him until the amount so credited to him should, in the aggregate, amount to £750. In the following year, 1877, Mr. *Bentley* addressed the company and pointed out to them that he had paid £481 5*s.* upon the 350 shares then standing in his name (that was after the rate of 4*s.* 6*d.* per share), and he demanded that credit should be given to him to the extent of £360 18*s.* 9*d.*, and asked to be allowed to appropriate that credit to particular shares, instead of its being distributed equally over the whole 350 shares, and suggested that that course would be advantageous to the company.

A meeting of directors was held on the same day, the 9th of August, and the letter was read, and it was resolved, that the sum of £360 18*s.* 9*d.* be and was thereby passed to the credit of Mr. *Bentley's* share account.

It appears that in the books of the company an entry was made crediting him with that sum. It appears, further, that a few days afterwards he was informed by the secretary of that sum having been credited to him; and, further, it appears that after that date transfers were executed by Mr. *Bentley*, and registered by the company, of 1325 shares, treating each of those as paid up to the extent only of 4*s.* 6*d.*

The first question is whether that is, within the 25th section of the Act of 1867, a payment in cash. If the matter had been uncovered by decision, I should not have had the slightest hesitation in determining that it was not, because I should have felt myself bound to give effect to every word of the statute and to say that payments in cash, and nothing but payments in cash, would have satisfied the obligations of the statute. But that is not the law. It has been determined in a series of cases that something short of actual payment in cash—something which the Courts have said to be equivalent to payment in cash—

will do; and amongst the decisions which have been arrived at is that in *Ferrao's Case* (1), which is a decision of the Court of Appeal, and is therefore binding upon me. In that case a claim was made against the company by a Mr. *Webb.* An action which he brought to enforce that claim was compromised, and a Judge's order was made by consent—in other words, an agreement was come to between the parties. Part of that agreement was that the company should pay *Webb* £3900; and that that was to be paid, as to £700, by a credit on the shares, not of *Webb*, but of a third person, viz., *Ferrao.* In that case Lord Justice *Mellish* said this (2): "Crediting means acknowledging that they" (that is, the company) "had received that amount in cash. It is exactly the same thing as if *Webb* had gone to the company and the company had handed over to *Webb* £700 in bank notes, and then *Webb* had said, 'I wish to pay up the shares of my friend *Ferrao.* There is the £700 in bank notes back again.' There is no need to go through that form, and in my opinion writing it off in the books is perfectly equivalent to payment."

Now if writing it off in the books by way of credit is equivalent to payment on the shares of a third person, it must surely be equivalent to payment on the shares of a man himself. That being so, I am unable to draw any intelligible or reasonable distinction between *Ferrao's Case* and the present case. On that ground I decide that what took place was equivalent to a payment of that description which is required, on the 350 shares.

It has been suggested, in the next place, that the agreement of March, 1876, by which this credit was agreed to be given, was invalid. Mr. *Higgins* at last suggested that it was fraudulent. Now with regard to that suggestion I can hardly say that the point has been really argued or pressed upon me. Certainly no evidence of fraud has been presented to me. Fraud is a thing which those who assert must prove in the most strict manner. It cannot be inferred except from circumstances which necessarily import it, or import it in the judgment of the jury or Judge of fact. No such circumstances have been brought before me in this case.

In the third place, it has been said that, even assuming the

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(1) Law Rep. 9 Ch. 355.

(2) Law Rep. 9 Ch. 357.

FRY, J.

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agreement of March to have been good, the mode in which Mr. *Bentley's* shares have been credited is bad because it does not pursue the terms of that agreement. It appears to me that there is nothing to have prevented a *bonâ fide* agreement between the company and Mr. *Bentley* by which the £750, or any part thereof, might be appropriated to particular shares. Such an appropriation might be to the interest of both the contracting parties, and I can see nothing whatever in what was done to suggest fraud or impropriety on behalf of the directors. I am bound to assume propriety in their conduct unless the contrary be shown; and finding nothing to prevent such an agreement; finding that Mr. *Bentley* proposed it, that the terms of his proposal were accepted in general terms, and finding that the company acted upon it immediately afterwards and transferred the series of shares with 4*s.* 6*d.* only credited upon them and made entries to that effect in their share ledger, it seems too late now to say that such an agreement was not entered into; and if it was entered into and was binding, effect must be given to it. I therefore think that Mr. *Bentley* has paid the full amount on these shares and that his name must be withdrawn from the list of contributories. Of course as this case is one which certainly required investigation the official liquidator, as well as Mr. *Bentley*, must have his costs out of the estate.

Buckley:—The order should be that the liquidator pay me the costs and take them out of the estate: *In re Massey* (1).

FRY, J.:—If so, the liquidator might have to pay them out of his own pocket in case there were not sufficient assets.

Buckley:—Then, if there are no assets, he should not raise discussions upon points of law.

FRY, J.:—I think I must order the costs to be paid out of the estate unless you can prove the contrary rule.

Solicitors: *D. E. Chandler*; *Rooks & Co.*

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(1) Law Rep. 9 Eq. 367.

FRY, J.
1879
July 18.

LAWRENCE *v.* FLETCHER.

[1874 L. 37.]

Solicitor's Lien—Country Solicitor and Town Agent—General and Particular Lien.

QBD 155

A *London* solicitor acting as agent for a country solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business and disbursements due from the country solicitor, whether in the particular action or in any other proceedings; but as between the town agent and the client, the lien of the former extends only to the costs of the particular action in which he is engaged.

THIS action was commenced in March, 1874, for the administration of the estate of *H. D. Lawrence*, by his daughter, who was devisee under his will, against *W. Fletcher* and *Thomas Gould*, the trustees of the will. The Plaintiff married *W. Bathew* in November, 1874, and a settlement was executed upon the marriage, the trustees of such settlement being *R. Walker* and *J. Hutchinson*, who were added as Defendants in the action. *Thomas Gould*, the trustee of the will, was a solicitor at *Uttoxeter* in partnership with *Jervis*, and *Jervis & Gould* acted as solicitors for the Defendants in the action, and employed Messrs. *Stokes, Saunders, & Stokes* as their *London* agents. The partnership of *Jervis & Gould* was dissolved in May, 1874, whereupon *Gould* continued to conduct the defence, and *Stokes & Co.* continued to be his town agents.

The action was brought to a hearing before Vice-Chancellor *Malins* in May, 1877, and an order was then made giving to *Jervis* and to *Gould* a lien for their costs, amounting to £504 3*s.* 2*d.*, upon a certain sum of consols then in Court; and it was ordered that the consols should be sold, and, after paying several small sums, the residue thereof (which ultimately amounted to £263 4*s.* 10*d.*) should be paid to *Gould* in part discharge and satisfaction of what was owing to him and to *Jervis* in respect of their lien; and it was further ordered that the costs of the Plaintiff and Defendants should be taxed (including in the Defendants' costs any charges and expenses in administering the estate), and the balance due was to be a charge upon the property comprised in the settlement made upon the marriage of the Plaintiff and *W. Batthew*, and was to be raised and paid by the trustees of such settlement. The balance due to the Defendants after taxation of their costs was found to be £395 16*s.* 11*d.*, and this sum, as well as the £240 18*s.* 4*d.* remaining due upon the lien of *Jervis & Gould*, was accordingly raised by the trustees, and was still retained in their hands.

In January, 1879, *Thomas Gould* died insolvent, and after his death *Jervis* acted as the solicitor for the Defendants in the action, and continued to employ *Stokes & Co.* as their agents. Various claims were then set up to payment out of the two sums of £395 16*s.* 11*d.* and £240 18*s.* 4*d.*, which had been raised by the trustees of the settlement. Messrs. *Stokes & Co.* claimed the sum of £454 7*s.* 3*d.* for the amount of agency charges due to them from *Gould* in respect of this action, and other claims were made by *Jervis* for sums of money due to him and to *Jervis & Gould* for the costs, charges, and expenses in the action; and a claim was made by *Fletcher*, the co-trustee of *Gould*, for money advanced to *Gould* upon an assignment by way of mortgage of *Gould's* share in the money awarded by the decree of May, 1877, and of his share of the costs, charges, and expenses in the action.

This was a motion by Messrs. *Stokes & Co.* for an order declaring that they, as the town agents of *Thomas Gould*, the country solicitor employed by the Defendants in the action, were entitled to a charge upon so much of the sums of money raised by the trustees of the settlement, and then in their hands, as was directed to be paid to *Thomas Gould*, and also upon the costs of the Defendants *Fletcher* and *Gould*, which were by the decree ordered to be raised and paid by the trustees, and which had been taxed at £395 16*s.* 10*d.* for the costs, charges, and expenses incurred by them, the said *Stokes & Co*, as agents for *Thomas Gould*, amounting to £454 7*s.* 3*d.*; and that the Defendants, the trustees of the settlement, might be ordered to pay the said sum of £454 7*s.* 3*d.*, or so much thereof as the moneys in their hands would suffice to pay, to the said Messrs. *Stokes & Co.*

North, Q.C., and *Farwell*, in support of the motion:—

As against the country solicitor the agent's lien is general, while as against the client his lien is only particular: *Bray* v. *Hine* (1). It is a rule of law, said *Littledale*, J., in *Dicas* v. *Stockley* (2), that an attorney has a lien upon all papers of his client which are in his hands for his skill, for all business of that client, but the agent (as against the client) has only a lien upon the money recovered and upon the papers in his hands for the amount due to him by the attorney in the particular cause; the same principle was decided in *White* v. *Royal Exchange Assurance* (3); and where there have been two country solicitors who have each employed the same town agent, his lien extends to what is due to him from each of such solicitors: *Ward* v. *Hepple* (4). Not until the agent is paid the whole of what is due to him will an order be made for delivering up the papers to the client: *Anon.* (5), and *Chaloner* v. *Chaloner* there cited.

This lien of the town agent extends to a charging lien upon a fund: *Potter* v. *Hyatt* (6); *Farewell* v. *Coker* (7). And all proceedings will be stayed until payment of the bill: *Shafto* v. *Powell* (8).

The summary jurisdiction of the Court in matters affecting a solicitor's lien extends to the representatives of a solicitor: *Redfearn* v. *Sowerby* (9). Even in a commission of bankruptcy the Court refused to order production of documents at a trial: *Ex parte Warren* (10). In *Stevens* v. *Avery* (11) a defendant was restrained from paying fees to the representatives of a deceased solicitor until the costs of his agent were paid. No doubt the *London* agent must give notice of his claim to the client, as in *Waller* v. *Holmes* (12) and *Peatfield* v. *Barlow* (13), but after such notice the client will be disentitled to pay anything to his country solicitor. In *Tardrew* v. *Howell* (14) the town agent was held entitled to a charge on all property recovered in three suits for an unascertained balance due to him by the country solicitor.

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(1) 6 Price, 203, 210.

(2) 7 C. & P. 587.

(3) 1 Bing. 20.

(4) 15 Ves. 297.

(5) 2 Dick. 802.

(6) 2 Y. & C. Ex. 112.

(7) 2 P. Wms. 460.

(8) Cited in 2 Fowler's Exch. Prac. 382.

(9) 1 Sw. 84.

(10) 19 Ves. 162.

(11) 1 Dick. 224.

(12) 1 J. & H. 239. 6 Jur NS 1367

(13) Law Rep. 8 Eq. 61.

(14) 3 Giff. 381. 7 Jur NS 1120

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[They also cited *Stokes* on Lien of Attorney (1) and *Lush's* Practice (2)].

Heath, for the Defendants *Fletcher*, *Jervis*, and the representative of *Gould*:—

The *London* agents of *Gould* can have no charge upon any part of these funds which did not belong to *Gould's* share. No doubt *Stokes & Co.* have priority to *Fletcher* and *Jervis's* charge on *Gould's* costs to the extent of a particular lien, but they can have no general lien on any part of the money in the hands of the trustees. There is no general lien against a fund in Court.

In *Bozon* v. *Bolland* (3) the solicitor was held not to have a charge upon a fund recovered in the suit, though he might have a lien upon the papers. The distinction between a charge on a fund and a lien on papers is there laid down. So in *Shaw* v. *Neale* (4) it was decided that a solicitor had no lien on an estate recovered for a client in respect of the costs and expenses incurred in recovering it. He had only a lien on the papers in his hands. In *Wilson* v. *Round* (5) a charging order was only allowed in respect of the taxed costs in the particular suit, and in *Ex parte Steele* (6) a lien was allowed to the town agent upon papers, not as against the client, but against the country solicitor, and the same principle was determined in *Ward* v. *Hepple* (7).

In *Ex parte Thompson* (8) an attorney under 23 & 24 Vict. c. 127, s. 28, was held only to have a charge upon property recovered or preserved for his client in respect of the costs in the particular matter or suit, not for general costs.

W. Barber, for the trustees of the marriage settlement.

FRY, J.:—

In this case really everything has become pretty clear by the discussion, except one point on which Mr. *Heath* has addressed me, namely, whether the lien of the town agent on the fund to be paid is, as against the country solicitor, general or particular.

(1) Page 180.
(2) 3rd Ed. vol. i. p. 346.
(3) 4 My. & Cr. 354.
(4) 6 H. L. C. 581.
(5) 4 Giff. 416. 10 Jur NS 34
(6) 16 Ves. 164.
(7) 15 Ves. 297.
(8) 3 L. T. (N.S.) 317.]

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Now, it appears to me to be plain that the lien of the town agent on deeds is, as against the country solicitor, general. The cases of *Ward* v. *Hepple* (1) and *Bray* v. *Hine* (2) seem to me to be distinct authorities for that. I am unable to find any reason why there should be a difference in the extent of the charging lien and of the retaining lien. There would be great inconvenience in introducing a distinction as to the extent to which the two liens should go, and further than that, I must bear in mind the observation of Lord *Hatherley*, when Vice-Chancellor, in *Waller* v. *Holmes* (3), in which he says this: "The Court has given all possible assistance to the agent for enforcing any lien which the country solicitor was capable of giving." Now, there can be no doubt whatever that the country solicitor is capable of giving to the town agent a lien upon any costs coming to the country solicitor for everything which may be due on the agency account between the country solicitor and the town agent. I think, therefore, that that is the more reasonable view to take of the rights of the town agent, and I think that the law is correctly laid down by Mr. *Whitley Stokes* in the passage in his work upon Lien of Solicitors (4) to which my attention has been drawn. "As against the country attorney," he says, "the agent's lien is general; as against the client his lien is only particular. In other words, as between the country attorney and the agent, the latter's lien extends to all costs for all agency business and disbursements due to him from the former, but as between the client and the agent the latter's lien only extends to the costs of the particular suit." I will give effect to that by declaring the lien of the present applicants in respect of all their agency charges—not going to other matters—all their agency charges as town agents whether in the present suit or in any other proceedings, against the three sums, that is £120 9*s.* 2*d.*, Mr. *Gould's* moiety of the £240 18*s.* 4*d.*, *Gould's* moiety of any portion of the £395 16*s.* 11*d.* which on inquiry may be found to be payable to *Jervis & Gould*, and also the entirety of the balance of the £395 16*s.* 11*d.*

There will be an inquiry, if desired, by the present representa-

(1) 15 Ves. 297.
(2) 6 Price, 203, 210.
(3) 1 J. & H. 239. 6 Jur 451.
(4) Page 180.

tives of the firm of *Jervis & Gould*, and at his risk as to what portion of the £395 16*s*. 11*d*. was for costs payable to *Jervis & Gould;* the costs of such inquiry to abide the result of the same. Messrs. *Stokes & Co.* will pay the trustees' costs and add them to their own, and then add the whole of such costs to their security.

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I will make an order appointing *Jervis* to represent *Gould* for the purpose of this application.

Solicitors: *Stokes, Saunders, & Stokes; Ashurst, Morris, Crisp, & Co.*, agents for *P. O. Jervis, Uttoxeter; T. White & Sons.*

BLUCK *v.* CAPSTICK.

[1877 B. 435.]

FRY, J.
1879
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6 Off Cas
77

Partnership—Dissolution—Return of Premium—Misconduct of Partner paying Premium.

When a partnership is dissolved before its natural expiration in consequence of the misconduct of a partner who has paid a premium, he is not entitled to a return of any part of the premium.

And, in such a case, if the premium agreed upon has not been actually paid before the dissolution, the partner who has agreed to pay it will be ordered to pay the whole of it, notwithstanding the dissolution.

THE Plaintiff carried on business as a tailor. On the 18th of May, 1877, he entered into a written agreement with the Defendant, in consideration of £500 to be paid to him as a premium by the Defendant, to take him into partnership, for one-eighth of the net profits of the business, for a term of seven years from the date of the agreement. The Defendant agreed to pay the Plaintiff one-eighth of the value of the then existing stock-in-trade, to be mutually agreed on. It was further agreed that the Defendant should find the sum of £50 and the Plaintiff the sum of £350, to open an account in their joint names at some bank, to provide for the expenses of carrying on the business. A proper deed of partnership was to be forthwith prepared by Mr. *Heather*, solicitor, and submitted to the parties for their approval, and in the case of any difference the same was to be determined by Mr. *Heather*.

The value of the Plaintiff's stock-in-trade was afterwards agreed to be £1685 12*s.*, and the Defendant paid to the Plaintiff £210 14*s.*, being one-eighth of that value. The Plaintiff and the Defendant respectively paid the sums of £350 and £50 into a joint banking account.

The writ in this action was issued on the 21st of September, 1877. The statement of claim was delivered on the 26th of October, and by it the Plaintiff alleged that the Defendant refused to pay the premium of £500 or any part thereof, and to execute a proper deed of partnership, or to carry on business in partnership with the Plaintiff. And the Plaintiff claimed that the Defendant might be decreed to pay to him the premium of £500, with interest, to execute a proper deed of partnership, and otherwise specifically to perform the agreement, the Plaintiff offering to perform the agreement on his part so far as it remained to be performed.

By his statement of defence and counter-claim, delivered on the 27th of November, 1877, the Defendant denied that he had refused to execute a proper deed of partnership, and said that a deed in accordance with the agreement was duly prepared by Mr. *Heather*, and that the Defendant had always been ready and willing to execute the deed, but the Plaintiff had always refused to execute it. He said that the business of the co-partnership had been jointly conducted by the Plaintiff and himself during May, June, and July, 1877, but he alleged that the Plaintiff had during the partnership used threatening and offensive language towards him, and had otherwise misconducted himself, and had by his conduct rendered necessary a dissolution of the partnership, and the Defendant had therefore refused to pay the premium of £500 or any part thereof, or to carry on business any longer with the Plaintiff. And the Defendant submitted that he was not liable to pay any part of the premium.

In the counter-claim the charges of misconduct on the part of the Plaintiff were stated more in detail, and the Defendant claimed a declaration that he was not liable to pay the premium of £500 or any part thereof; to have the partnership dissolved, and the business wound up under the direction of the Court; to have the sums of £210 14*s.* and £50 repaid; and consequential relief.

On the 7th of December, 1877, the Plaintiff amended his statement of claim, by claiming in the alternative a dissolution of the partnership.

In his reply, delivered on the 10th of December, 1877, the Plaintiff set forth a letter, dated the 14th of November, 1877, from Mr. *Heather* to himself, in which Mr. *Heather* said that he had, under the power given to him by the agreement, settled the deed of partnership and thereby tendered it to the Plaintiff for execution. He added that the Defendant would sign it. The Plaintiff alleged that he did not then sign the deed because the clerk who brought it declined to give his solicitors time to peruse it, but he said that he did not decline to sign it. He denied the charges of misconduct on his part, and said that during May, June, and July, 1877, the Defendant neglected the business and rendered no assistance to the Plaintiff in the conduct thereof. He alleged that, owing to the false charges brought against him by the Defendant in his statement of defence and counter-claim, and for divers other causes not connected with any misconduct on the Plaintiff's part, it was impossible that the partnership could be carried on with mutual trust and confidence, or with any beneficial result. The Plaintiff therefore desired and he submitted to an immediate judgment for the dissolution of the partnership, without prejudice to any question as to any other relief claimed by either party.

On the 20th of December, 1877, on motion by the Plaintiff, and the Plaintiff and the Defendant by their counsel respectively consenting that the motion should be treated as the trial of the action, the Court declared that the partnership ought to be dissolved as from the 20th of December, 1877, and ordered accordingly, and it was ordered that the usual accounts and inquiries should be taken and made, and also an inquiry whether the Defendant was liable to pay to the Plaintiff the premium of £500, or any and what part thereof. By the evidence it appeared that on the 22nd of October, 1877, the Defendant entered the service of a firm of warehousemen at a salary of £120 a year, his duties under that employment occupying him from nine o'clock in the morning until six o'clock in the evening. The Defendant made an affidavit in which he said that he was ready and willing to pay the Plaintiff a proportionate part of the premium of £500 for the period between the date of the agreement of partnership and the dissolution by the Court, *i.e.*, seven months, which would amount to £41 13*s.* 4*d.*, and also interest on the £500 for the same period at 4 per cent., which would amount to £11 13*s.* 4*d.*, and he submitted that this was all that the Plaintiff was entitled to. By the certificate of the Chief Clerk dated the 19th of May, 1879, at the request of the parties, the question whether the Defendant was liable to pay to the Plaintiff the premium of £500 was submitted to the judgment of the Court. The action now came on for further consideration.

Glasse, Q.C., and *G. O. Edwards*, for the Plaintiff:—

The dissolution is clearly due to the misconduct of the Defendant alone, a misconduct amounting to a repudiation of the partnership contract; and, that being so, the Court would not order the Plaintiff to return any part of the premium if it had been paid: *Airey* v. *Borham* (1); *Wilson* v. *Johnstone* (2). And, as he has not paid it, he ought now to pay the whole of it.

Mackeson, Q.C., and *Bagnold*, for the Defendant:—

The most that the evidence shews is some misconduct on both sides. But even misconduct on the part of a partner who has paid a premium is not a ground for refusing him a return of a proportionate part in the event of a premature dissolution: *Astle* v. *Wright* (3); *Atwood* v. *Maude* (4); *Freeland* v. *Stansfeld* (5). In *Bury* v. *Allen* (6), notwithstanding the fact that the Plaintiff's exclusion from the partnership was caused by provocation given by him to his partner, it was held that the Plaintiff was entitled to a return of premium. In *Pease* v. *Hewitt* (7) both partners were in the wrong, and a return of premium was ordered.

Fry, J.:—

The only matter really in controversy arises out of the inquiry which was directed at the trial whether the Defendant ought to pay to the Plaintiff the whole or any part of the premium of £500. In answering that inquiry I must have regard to the circumstances which have led to the dissolution of the partnership. The £500 ought, under the terms of the agreement, to have been paid in May, 1877, but it has in fact not been paid at all. [His Lordship then referred to the pleadings and to the evidence, and continued:—] The allegations of misconduct on the part of the Plaintiff fail, and in my opinion the Defendant has in effect rescinded the partnership agreement without any excuse. I hold, therefore, that he would not, if the premium had been paid, be entitled to a return of any part of it, and I direct the payment of the whole of it to the Plaintiff. If I were to allow the Defendant's own misconduct to entitle him to retain any portion of the premium I should be allowing him to avail himself of his own wrong. In some cases no doubt the Court has directed a return of premium, but those were cases in which either the partnership had come to an end without any fault of either partner, or there had been misconduct on both sides, or the recipient of the premium had himself brought about the dissolution. But, so far as I am aware, there is no case in which a return of premium has been ordered when the partner who has paid the premium has himself brought about the dissolution by his misconduct.

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(1) 29 Beav. 620.
(2) Law Rep. 16 Eq. 606.
(3) 23 Beav. 77. 2 Jur N.S. 849
(4) Law Rep. 3 Ch. 369.
(5) 2 Sm. & Giff. 479. 1 Jur N.S
(6) 1 Coll. 589.
(7) 31 Beav. 22.

Solicitors for Plaintiff: *Dixon, Ward, Letchworth, & Weld.*
Solicitors for Defendant: *Heather & Son.*

FRY, J.
1879
July 29.

AMES v. CADOGAN.

[1876 A. 180.]

Special Power of Appointment—Exercise—General Words—Will—Construction.

Under his marriage settlement a testator had a power of appointment by deed or will over personal estate among his children. He had no other power of appointment. By his will he devised and bequeathed all the real and personal estate of or to which he might be at the time of his death seised or entitled, or over which he might have "any beneficial power of disposition" (save such as were by his will otherwise devised or bequeathed) to trustees, upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses, debts, and legacies, and as to the residue of the proceeds, upon trust, as to one-third, for his eldest son; as to another third, for his younger sons in equal shares; and, as to the remaining third, upon trust for his daughters in equal shares, their shares to be settled for the benefit of themselves, their husbands, and children:—

Held, that the power was not exercised by the will.

BY the settlement, dated the 8th of November, 1852, made upon the marriage of *H. M. Ames* and *Sarah Elizabeth* his wife, certain sums of bank annuities and bank stock, the property of the husband, were vested in trustees, upon trust, after the death of the survivor of the husband and wife, as to one equal moiety thereof for all and every the children and child of the marriage, and, if more than one, in such parts, shares, and proportions, or for any one or more of such children exclusively of the other or others of them, at such age or ages, days or times, and subject to such conditions, charges, provisoes, and limitations over for the benefit of or relating to some one of the said children, and with such provisions for their maintenance, education, and advancement as the husband and wife during their joint lives should jointly appoint, and in default of such appointment, then as the survivor of them should by deed or will appoint, and in default of appointment, in trust for all and every the children or child of the marriage at twenty-one or marriage, and, if more than one, in equal shares as tenants in common. By the same settlement certain other funds the property of the wife were vested in the trustees upon trusts, as to a moiety thereof, similar to those declared as above mentioned of a moiety of the funds brought into settlement by the husband.

There were seven children of the marriage, two of whom (infant daughters) were (by a next friend) the Plaintiffs in this action. The other five children were Defendants. Three of them were sons. The other two were daughters, both of whom, Mrs. *Ellis* and Mrs. *Parker*, were married. Their respective husbands and the respective trustees of their marriage settlements were also Defendants.

Sarah Elizabeth Ames died on the 28th of February, 1868, leaving her husband her surviving, but without having joined with him in exercising the joint power of appointment limited to them by the settlement. At the date of the will of her husband, *H. M. Ames*, the property brought into settlement by her had been realized and the proceeds thereof, amounting to £41,784, had been advanced on mortgage of an estate, called the *Linden* estate, belonging to him.

By his will, dated the 5th of February, 1873, *H. M. Ames* bequeathed certain legacies and made certain specific devises of real estate. And he devised and bequeathed a leasehold messuage, and all other the real and personal estate and effects whatsoever and wheresoever of or to which he might be at the time of his death seised or entitled, or over which he might have "any beneficial power of disposition" (save such as were by his will otherwise devised or bequeathed), unto and to the use of trustees, upon trust for the sale and conversion thereof. And upon trust, out of the proceeds of the sale and conversion thereof, to pay and satisfy all his funeral and testamentary expenses and debts, and the legacies bequeathed by his will and any codicil thereto, and in particular he directed his trustees out of the said proceeds to pay and satisfy the mortgage for £41,784 on the *Linden* estate, so as entirely to exonerate that estate and the owner thereof for the time being therefrom, and, as to the residue of the said proceeds of the sale and conversion, as to one equal third part thereof upon trust for such eldest or other son of the testator as should under the trusts of his will become entitled to the *Linden* estate for a vested estate in fee simple in possession; with remainder, in case no son of the testator should live to become so entitled, upon trust for such eldest or other daughter of the testator as under the trusts of his will should first become entitled to the rents of the *Linden* estate for a vested estate in possession; and, as to one other equal third part of the residue of the proceeds of the sale and conversion, upon trust for such younger son or sons of the testator as should live to attain twenty-one, or die under that age leaving issue living at his death, in equal shares if more than one. And, as to the remaining equal third part of the residue of the proceeds of sale and conversion, upon trust for all and every the testator's daughters or daughter who should be living at his death, or should have died leaving issue who should be living at his death, in equal shares if more than one. And the testator directed a settlement of the share of each of his daughters, so as to give her a life interest, with a life interest in remainder to her husband, with remainder in trust for her children as therein mentioned, with remainders over. The testator died on the 1st of May, 1874.

This action was brought for the execution of the trusts of the settlement of the 8th of November, 1852, and the declaration of the rights of the parties. The principal question was whether the residuary devise and bequest contained in the will of *H. M. Ames* operated as an exercise of the power limited to him by the settlement as having survived his wife.

The testator had no other power of appointment.

J. Pearson, Q.C., and *G. M. Davidson*, for the Plaintiffs:—

The words "any beneficial power" shew that the testator could not have intended to exercise this power; it was a power which he could not exercise for his own benefit. Moreover, the limitations of the will are in excess of the power.

[They were stopped by the Court.]

Glasse, Q.C., and *Wolstenholme*, for Mr. and Mrs. *Parker* and their trustees:—

Thornton v. *Thornton* (1) is distinguishable.

Bristowe, Q.C., and *Cecil Russell*, for Mrs. *Ellis* and her children, and their trustees.

(1) Law Rep. 20 Eq. 599.

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Higgins, Q.C., and *G. C. Price*, for Mr. *Ellis*:—

The power has been exercised. The words ought to be construed *reddendo singula singulis*: *Cowx* v. *Foster* (1); *Ferrier* v. *Jay* (2); *In re Teape's Trusts* (3); *Thornton* v. *Thornton* (4). The word "beneficial" is surplusage, or it may mean a power over an estate in which the testator had a beneficial interest, as distinguished from an estate of which he was a bare trustee.

Cookson, Q.C., for the sons:—

Excessive exercise of a power is no argument for non-exercise. Whether a testator intends to exercise a power is to be collected from the whole will, and not from the force of any particular expression: *Bailey* v. *Lloyd* (5).

P. V. Smith, for the trustees of the settlement.

FRY, J., after stating the effect of the settlement, the will, and the other facts, continued:—

The question is whether by the will the testator intended to appoint, and did appoint, the property over which he had a power of appointment under the marriage settlement. In my judgment he did not. In the first place, the words "property over which I may have any beneficial power of disposition" appear to me to exclude the property comprised in the settlement. He could not, under the power of disposition given to him by the settlement, derive any benefit, and I understand the word "beneficial," as used by the testator, to describe a power from the exercise of which he or his estate could derive a benefit. It is not necessary to determine which of those meanings is to be attached to the phrase, because either of them would equally exclude the power given by the settlement.

I come to this conclusion, not merely by reason of the force of the word "beneficial," which I think carries with it the meaning I have already mentioned, but also because by so reading the word I make the whole will consistent with itself, whereas by the

(1) 1 J. & H. 30.
(2) Law Rep. 10 Eq. 550.
(3) Law Rep. 16 Eq. 442.
(4) Ibid. 20 Eq. 599.
(5) 5 Russ. 330.

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opposite construction I should make it inconsistent, and I should be holding that the testator had exercised the power by directing his debts and funeral expenses to be paid out of a fund which he had no power to devote to that purpose, and by giving to the husbands and children of his daughters funds which he had no power to give, except to his own children. That is, I think, a very strong argument in favour of my construction.

There is another observation which, though less forcible, is still entitled to some weight. The £41,784 invested on the mortgage of the testator's *Linden* estate represented funds which his deceased wife had contributed to the settlement, and, therefore, if he was exercising the power of appointment by his will, he was giving one moiety of the £41,784, and he was therefore directing that a moiety of the £41,784, together with some other bequeathed and devised property, was to pay the mortgage debt of £41,784, an arrangement which is possible but not probable. For these reasons I am of opinion that the testator did not intend to exercise the power contained in the marriage settlement.

Solicitors for Plaintiffs and for Trustees of Settlement: *Davidson, Burch, & Whitehead.*

Solicitors for other parties: *Domville, Lawrence, & Co.; Bowlings, Foyer, & Hordern.*

FRY, J.
1879
Aug. 4.

UPTON *v.* BROWN.

[1875 U. 1A.]

Marriage Settlement—Wife's Property—Ultimate Trust for Next of Kin—"Die without having been married"—Husband's Life Interest determinable on Bankruptcy—Resulting Trust.

By a settlement made on the second marriage of a widow of her property, a life estate for her separate use was given to the wife, followed by an estate to the husband for his life or until his bankruptcy. Provisions were then made for the children of the marriage and a son of the wife's former marriage. And it was declared that, if the son of the former marriage should die under twenty-one, and if there should be no child of the marriage who should attain twenty-one or marry under that age, then, subject and without prejudice to the trusts before declared, and after the death of the husband, and of the son of the former marriage under twenty-one, and the default or failure of children

But see Emmins v. Bradford, Johnson s E 13 Ch D. 493,

[illegible]

of the marriage, "which shall last happen," the trustees should hold the property, if the wife should survive the husband, in trust for her absolutely, but, if the husband should have survived the wife, in trust for such persons as the wife should by will appoint, and, subject thereto, in trust for her next of kin as if she had died intestate and "without having been married."

The wife died first, without having exercised the power of appointment. There were no issue of the marriage. The son of the former marriage survived his mother, but died under twenty-one. Before the wife's death the husband had filed a liquidation petition:—

Held, that the infant son was entitled, as sole next of kin of his mother, to the trust fund.

Wilson v. *Atkinson* (1) followed.

But *held*, that the trust for the next of kin did not arise until after the death of the husband, and that consequently he was entitled to the income of the trust fund for his life, and that this interest had vested in the trustee under his liquidation.

ON the 1st of March, 1873, *Sarah Upton*, then a widow, married *G. D. Robinson*. At the time of the marriage she had a son named *George Upton*, the issue of her former marriage, who was an infant. She was carrying on the business of an eating-house keeper. On the 28th of February, 1873, articles were entered into between *Sarah Upton*, *G. D. Robinson*, and *Samuel Brown* for the settlement of all her property in the manner therein mentioned. On the 4th of November, 1873, a settlement was executed in pursuance of the articles, by which the stock-in-trade, book, and other credits and effects forming the capital, profits, and assets of Mrs. *Robinson's* business, and the goodwill of the business, and the trade and other tenant's fixtures belonging thereto, were assigned to *Samuel Brown* and *Thomas Lancaster*, on trust to permit Mrs. *Robinson*, during her life or so long as she should desire to do so, to carry on the business in such manner as she should, notwithstanding coverture, consider fitting, for her sole and separate benefit during her life. And, after her death, upon trust, if *G. D. Robinson* should survive her and should not have become bankrupt or insolvent, and should not have assigned, charged, or incumbered, or attempted or affected to assign, charge, or incumber the income of the trust premises or any part thereof, or have done or suffered anything whereby the same or any part thereof would, through his act or default or by operation or process of law or otherwise, if belonging absolutely to

(1) 4 D. J. & S. 455.

him, have become vested in or payable to some other person or persons, upon trust to permit *Robinson* during his life, or so long as he should desire so to do, to continue to carry on the business at his own discretion, and to retain the clear profits of the business during his life, or until he should become a bankrupt or insolvent, or should assign, charge, or incumber the said income or some part thereof, or should attempt or affect so to do, or should do or suffer something whereby the same or some part thereof would, through his own act or default or by operation or process of law or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons. Then followed a trust on the request in writing of Mrs. *Robinson* during her life, or, after her death, of *G. D. Robinson* if he should survive her, or after the death of the survivor of them at the absolute discretion of the trustees, to exchange the said business for another of a similar kind, or to wind up the business and to sell the stock-in-trade and other assets thereof and the goodwill thereof, and to invest the net proceeds of sale in the purchase of another business of a similar kind, or to stand possessed of the net surplus upon the trusts thereinafter declared. And by the deed there was also assigned to the trustees all the furniture and household effects belonging to Mrs. *Robinson*, and mentioned in a schedule, upon trust to permit the same to be used and enjoyed by Mrs. *Robinson* during her life, in such manner and at such place or places as she might desire, to the intent that no husband of her should have power to interfere with such user and enjoyment, and to the further intent that the trustees or trustee for the time being should, on the request in writing of Mrs. *Robinson* during her life, and after her death on the request in writing of *G. D. Robinson*, if he should survive her, and after the decease of the survivor of them at the absolute discretion of the trustees or trustee for the time being, sell the furniture and household effects, and should stand possessed of the net proceeds upon the trusts thereinafter declared. Then followed a trust for the investment of the proceeds of sale both of the business and the furniture, and to pay the income to Mrs. *Robinson* during the joint lives of herself and *G. D. Robinson*, for her separate use without power of anticipation, with remainder to the survivor during his or her life, and after the death of such survivor to stand possessed of the trust premises and the income thereof, upon trust, as to a portion of the profits of the business or of the proceeds of sale thereof not exceeding in value £1000, as Mrs. *Robinson*, whether covert or sole, should by will appoint, and, subject thereto, upon the trusts thereinafter declared concerning the residue of the trust fund. And the trustees were to stand possessed of the residue of the trust fund and the income thereof in trust for *George Upton* jointly with the children of the marriage and his and their respective issue, born during the lives of Mr. and Mrs. *Robinson* or the life of the survivor of them or within twenty-one years after the death of such survivor, as Mrs. *Robinson* should, whether covert or sole, by deed or will appoint, and subject thereto as *G. D. Robinson* should in like manner appoint, and, subject thereto, in trust for *George Upton*, if he should attain twenty-one, jointly with all the children of the marriage at twenty-one or marriage, or, if *George Upton* should die under twenty-one, for all the children or any such children of the marriage in equal shares, and, if there should be no such children, then for *George Upton* alone if he should attain twenty-one. And it was declared that "if the said *George Upton* shall die without attaining the age of twenty-one years, and if there be no child of the said marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry under that age, then, subject and without prejudice to the trusts hereinbefore declared, and after the death of the said *G. D. Robinson* and of the said *George Upton*, without having attained his age of twenty-one years, and such default or failure of children as aforesaid, which shall last happen," the trustees were to stand possessed of the trust premises and the income thereof, if Mrs. *Robinson* should survive *G. D. Robinson*, in trust for her absolutely, but "if the said *G. D. Robinson* shall have survived the said *Sarah Robinson*," in trust for such person or persons as she, notwithstanding coverture, should by will appoint, and, subject thereto, "in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the death of the said *Sarah Robinson*, had she died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common, in the shares in which they would have taken under the same statutes."

There were no issue of the marriage. Mrs. *Robinson* died on the 24th of October, 1875, without having exercised the power of appointment given to her by the settlement. *G. D. Robinson* and *George Upton* both survived her. In 1875 *G. D. Robinson* filed a liquidation petition, and on the 21st of August, 1875, *Henry Brown* was appointed trustee of his property.

This action was commenced on the 1st of November, 1875, to have the trusts of the settlement carried into execution under the direction of the Court, the infant *George Upton* being the Plaintiff by a next friend, and the Defendants being the trustees of the settlement. The trustee in the liquidation was afterwards added as a Defendant.

By the judgment at the trial of the action on the 15th of January, 1877, it was declared that, on the true construction of the settlement, and in the events that had happened, the trustee in the liquidation of *G. D. Robinson* did not take and was not entitled to any estate or interest in the business or the stock in trade, household furniture, book debts, credits, and effects employed in or arising from the business or the goodwill thereof, or in the trade or other tenant's fixtures, or other articles or things used in or connected with the business or the carrying on thereof, but that the same were to be held by the trustees of the settlement for the benefit of the infant Plaintiff. And, the Plaintiff and the trustees not disputing that *G. D. Robinson* was entitled to such part of the household furniture and effects upon the premises where the business was carried on as were not used in or connected with the carrying on of the business, it was ordered that an inquiry should be made of what the last-mentioned household furniture and effects consisted, and what was the value of the life interest of *G. D. Robinson* therein. And it was ordered that the value of that life interest should be paid by the receiver in the action to the trustee in the liquidation.

On the 8th of August, 1877, the Plaintiff died. He was still an infant and unmarried. The action was afterwards continued by his personal representatives. On the 14th of December, 1877, an order was made directing additional accounts and inquiries, among which was an inquiry who were the person or persons who, under the statutes for the distribution of the effects of intestates, would have been entitled to the estate of Mrs. *Robinson*, if she had died intestate and without having been married.

The present summons was taken out by the surviving trustee of the settlement, asking that it might be directed that, on the death of *George Upton* without having attained a vested interest under the provisions especially in his favour in the settlement, and in the events which had happened, the ultimate provision of the settlement for the next of kin of Mrs. *Robinson*, as if she had died intestate and without having been married, excluded her husband, but not *George Upton*.

Crossley, for the trustee, submitted the question to the Court.

Bristowe, Q.C., and *Warmington*, for the next of kin of the wife:—

The next of kin of the wife are entitled, and *George Upton* is excluded. This is the natural meaning of the words, for, if the mother had in fact died without having been married, she would not have had a child. The settlement makes express provisions for *George Upton* and any children of the marriage. In *In re Ball's Trust* (1) there was no provision for children of the marriage, and that distinguishes that case from the present. The Court might well assume that it could not have been intended to make no provision whatever for children in a marriage settlement. In *Mitchell* v. *Colls* (2) the word was "unmarried," and Lord *Wensleydale* differed from the other Lords. In *Wilson* v. *Atkinson* (3) the settlement contained no express provisions for children or issue, and there was a declaration that an illegitimate daughter of the wife should, for the purposes of the ultimate trust, be deemed to be her lawful child. That was the real ground for the decision that that daughter took as next of kin to her mother. In *In re Norman's Trust* (4) the words were "without being married," and the settlement contained no express provision for children. In *In re Saunders' Trust* (5) the word was "unmarried." The observations of Vice-Chancellor *Shadwell* in *Smith* v. *Smith* (1) are in our favour.

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(1) 11 Ch. D. 270.

(2) Joh. 674; 9 H. L. C. 601.

(3) 4 D. J. & S. 455.

(4) 3 D. M. & G. 965. 17 Jur 444

6 Jur NS 292 (5) 3 K. & J. 152.

[Fry, J.:—My difficulty is that *George Upton* cannot be excluded without also excluding the children of a third marriage of the mother.]

The trust for the next of kin only arises in the event of his dying under twenty-one, and there being no children of the marriage who attain twenty-one or marry. The mother could have provided for *George Upton* by means of her power of appointment. "Without having been married," is equivalent to "without ever having been married."

J. Pearson, Q.C., and *Caldecott*, for the representative of *George Upton*, were not heard.

J. M. Lloyd, for the trustee in the liquidation of the husband.

Fry, J.:—

In my view this case is governed by *Wilson* v. *Atkinson* (2), which, I think, is a decision that such words of limitation as are found in the present settlement are introduced merely to exclude any husband of the wife, and not to exclude any persons who may be her descendants. It is true that in the present case there is that which did not occur in *Wilson* v. *Atkinson*, viz., an express provision for the children of the marriage, and the child of the former marriage, in the event of their attaining twenty-one. But there is nothing inconsistent in first giving a child an interest if he attains twenty-one, and then afterwards giving him an interest if he dies under twenty-one, contingently upon his mother's not making a will in favour of someone else. Moreover, if I were to hold that this child is excluded, I must equally have held that his children were excluded if he had married and had died under twenty-one leaving children, and I must equally have excluded children of a third marriage of the mother, for whom the settlement makes no express provision. Such considerations as these have influenced the Courts in holding, that under similar limitations children of the marriage are not excluded, and I think I

(1) 12 Sim. 317, 326.

(2) 4 D. J. & S. 455.

should not be giving effect to the real principle of the decision of the Court of Appeal in *Wilson* v. *Atkinson* (1) if I were to hold that *George Upton* is excluded.

J. M. Lloyd, for the husband's trustee :—

The trust for the next of kin does not arise till after the death of the husband; meanwhile there is a resulting trust for the wife, the benefit of which passes to the husband as her administrator, and that is now vested in the trustee under the husband's liquidation: *Anon.* (2); *Hawkins* v. *Hawkins* (3).

J. Pearson, Q.C., and *Caldecott*, for the representative of *George Upton* :—

This point is concluded by the judgment of the 15th of January, 1877.

[FRY, J.:—That was only a decision in the events which had then happened. The son had not then died.]

The whole of the settlement must be looked at. The death of the husband is only referred to on the supposition that he does not become bankrupt. His life interest is expressly taken away in the event of bankruptcy; his bargain is for an interest for life or until bankruptcy, and for nothing more. It could not have been intended by the ultimate trust to give him that which had been already taken from him.

FRY, J.:—

I think that the husband's trustee is justified in his contention that he is entitled to the income during the life of the husband. The ultimate trust for the next of kin of the wife arises "after the death of the said *G. D. Robinson* and of the said *George Upton*, without having attained his age of twenty-one years, and such default or failure of children as aforesaid, which shall last happen;" on the happening of the last of those three events, the trustees are to hold the property, if the husband should survive the wife, on trust for such persons as she should by will appoint, and, subject thereto, on trust for her next of kin as if she had died intestate and without having been married. It appears to me that

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(1) 4 D. J. & S. 455.

(2) 1 Giff. 392.

(3) 7 Sim. 173.

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this ultimate limitation is clearly expressed as to take effect only on the death of the husband, the death under twenty-one of the son by the wife's former marriage, and the default or failure of children of the marriage; till the happening of the last of those three events the gift over is not to take effect. It is said that this construction involves an inconsistency, inasmuch as the result is to give back to the husband unconditionally for his life that property in respect of which his life estate has been previously made subject to a contingency. But I think there is really no inconsistency. This gift arises only in the event of the failure of the issue of his own marriage and the failure of the issue of his wife's former marriage, and it is quite conceivable that the wife may have intended that on the happening of these events the husband's life interest should not be subject to the contingency. Moreover, it must be remembered that a husband is by virtue of his marital right entitled to all the personal property of his wife which is not expressly taken from him.

Solicitor for Plaintiff: *S. D. Hamilton.*
Solicitors for Trustee of Settlement: *A. Hicks & Arnold.*
Solicitors for Wife's Next of Kin: *Shum, Crossman, & Crossman.*
Solicitor for Husband's Trustee: *R. Ballard.*

FRY, J.
1879
Aug. 4.

BROWN *v.* TROTMAN.

[1878 B. 100.]

Solicitor—Costs—Charging Order—Form of Application—Petition or Summons—Persons to be served—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 39.

An application by a solicitor, under sect. 28 of the *Solicitors Act* of 1860, for an order charging his costs upon the interest of a party to an action in a fund in Court, is, notwithstanding sect. 39 of the *Judicature Act*, 1873, properly made by a petition in the action.

But the other parties to the action ought not to be served with the petition.

THIS was a petition by *T. D. Dutton*, formerly the solicitor of the Defendant in the action, praying for a declaration that the

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Petitioner was entitled to a charge upon the share and interest of the Defendant in a sum of £420 9*s.* 1*d.* Consols, in Court to the credit of the action, for the taxed costs, charges, and expenses of the Petitioner of and relating to the action, as the solicitor employed by the Defendant in the defence of the action. The petition was served on the Plaintiff and on the Defendant.

H. M. R. Pope, for the Petitioner.

Lawson, for the Defendant:—

The application should have been made by summons, not by petition: *Judicature Act,* 1873, s. 39.

[FRY, J.:—The course of the Court has been to make these orders upon petition. I shall not deviate from it.]

The Plaintiff ought not to have been served. The Petitioner cannot charge the Defendant with the Plaintiff's costs of the petition.

Dundas Gardiner, for the Plaintiff.

Pope, in reply:—

It has been the practice to serve the parties to the action: *In re Keane* (1).

FRY, J.:—

The Plaintiff ought not to have been served. The Petitioner must pay his costs, and cannot add them to the costs of the petition which he will have from the Defendant.

Solicitor for Petitioner: *T. D. Dutton.*
Solicitor for Defendant: *H. Cosedge.*
Solicitor for Plaintiff: *A. S. Godfrey.*

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(1) Law Rep. 12 Eq. 115.

FRY, J.

1879

Aug. 5.

In re GAUDET FRÈRES STEAMSHIP COMPANY.

Company—Winding-up—Jurisdiction—Enforcing Compromise with Stranger—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7.

An order having been made to wind up a company, the holder of debentures issued by the company took out a summons in the winding-up to enforce his security. The Chief Clerk, on the 10th of January, held that the issue of the debentures was *ultrà vires*, and that the summons must be dismissed, unless the applicant should before the 19th of January require an adjournment before the Vice-Chancellor. On the 17th of January the applicant gave notice that he desired the adjournment, and the summons was set down for hearing by the Vice-Chancellor on the 31st of January. On that day, negotiations having been meanwhile opened between the liquidator and the applicant for a compromise of his claim, the summons was ordered to stand over generally, to be restored to the list on application. The negotiations resulted in an agreement, which was approved by the creditors and sanctioned by the Vice-Chancellor, that the liquidator should sell all the assets of the company to the applicant, he paying 6*d.* in the pound to the creditors, in discharge of their debts, and the costs of the liquidation. The applicant paid the 6*d.* in the pound, and part of the costs. The liquidator took out a summons in the winding-up to enforce the payment of the remainder of the costs:—

Held, that the applicant had by his own summons submitted the determination of his rights to the Court in the winding-up; that that summons was still a pending matter; and that, consequently, by virtue of sect. 24, sub-sect. 7, of the *Judicature Act*, 1873, the Court had jurisdiction in the winding-up to enforce the compromise.

THIS company was incorporated on the 1st of April, 1873, to purchase the business of Messrs. *Gaudet Frères*, of *Paris*, and the steam and other vessels belonging to them. The company issued fifty mortgage debentures for £500 each to *Andrew Leslie*, these being the whole of the mortgage debentures issued by the company. The payment of the debentures was collaterally secured by mortgages of the steam-vessels of the company. On the 3rd of November, 1876, an order was made to wind up the company. *Leslie* took possession of the steam-vessels mortgaged to him, but he alleged that they were not worth more than £12,000, thus leaving £13,000 due to him on his debentures. On the 5th of April, 1877, he took out a summons in the winding-up, asking for a declaration that the undertaking and business by the memorandum of association of the company authorized, and all the real and personal property belonging to the company, and all the rents, profits, and gains arising or derived therefrom, of or to which the company was possessed or entitled at the commencement of the winding-up, were subject to the debenture securities and charges thereby created in favour of the applicant, and ought to be applied in the first instance to satisfy or provide for the amount due to the applicant for principal and interest in respect of such mortgage debentures, in priority to the unsecured creditors of the company; and that the liquidator might be ordered to do and concur in all acts and assurances which might be necessary to give to the applicant possession of the river plant belonging to the company upon the River *Seine*, in *France*, and also the office furniture of the company in the possession of the liquidator, and to pay over to the applicant the cash received by the provisional and official liquidators respectively, such river plant, furniture, and cash to be transferred and paid to the applicant in part satisfaction of the balance due to him upon his debentures.

This summons came on to be heard before the Chief Clerk of Vice-Chancellor *Malins* on the 10th of January, 1878. The Chief Clerk held that the issue of the debentures was *ultrà vires*, and that they were therefore void, and he ordered the summons to be dismissed with costs, unless *Leslie* should before the 19th of January require to have the summons adjourned for hearing before the Judge. On the 17th of January *Leslie* gave notice that he desired the adjournment, and the summons was accordingly set down for hearing by the Vice-Chancellor on the 31st of January. Before, however, that day arrived negotiations had taken place between *Leslie* and the liquidator for a compromise of the matter, and on the 31st of January an order was made that the summons should stand over generally, to be restored to the Vice-Chancellor's list on application. This was the effect of the entry in the Chief Clerk's book. The negotiations resulted in an agreement which was afterwards embodied in articles, dated the 18th of February, 1878, and made between the company of the first part, the liquidator of the second part, and *Leslie* of the third part, whereby it was agreed that the company and the liquidator should sell to *Leslie* all the assets of the company, in consideration of his paying the creditors of the company who should be certified by the Chief Clerk the sum of 6*d.* in the pound as a composition and in discharge of their debts, and also paying the whole of the costs, charges, and expenses of the liquidation. This arrangement was approved by the proper majority of the creditors of the company, and was sanctioned by the Vice-Chancellor on the 24th of July, 1878. The assets were afterwards handed over to *Leslie,* and he paid the 6*d.* in the pound to the creditors, and also a part of the costs of the liquidation.

On the 2nd of July, 1879, the liquidator took out a summons asking that *Leslie* might be ordered to pay to the liquidator the sum of £285 8*s.* 11*d.*, being the deficiency required by the liquidator to enable him to pay the balance of the costs of the liquidation. The solicitor of the liquidator, in an affidavit which he made in support of the summons, stated that *Leslie's* summons was not heard on the 31st of January, 1878, "but stood over generally, to be restored to the Judge's list on application in case the said negotiations should fall through or should not be sanctioned by the Judge."

Cookson, Q.C., and *Everitt,* for the liquidator:—

It is suggested that there is no jurisdiction in the winding-up to enforce the compromise against *Leslie.* But his own summons is still a pending matter and he is a party to it, and has submitted to have his rights determined in the winding-up. Therefore, the Court has jurisdiction by virtue of sect. 24, sub-sect. 7, of the *Judicature Act,* 1873: *Eden* v. *Naish* (1); *Scully* v. *Lord Dundonald* (2); *Ex parte Robertson* (3).

E. Cutler, for *Leslie:*—

The original summons was dismissed, or at any rate it has been abandoned. In fact the matter was concluded by the compromise, and there is no longer a pending matter. The liquidator's own evidence shews that the summons was only to be restored in case the negotiations should fall through.

[FRY, J.:—I must accept the Chief Clerk's note as a correct statement.]

(1) 7 Ch. D. 781.
(2) 8 Ch. D. 658.
(3) Law Rep. 20 Eq. 733.

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Leslie alleges that the compromise is invalid, and he ought to have an opportunity of proving that, and *Gilbert* v. *Endean* (1) shews that this should be done in an independent proceeding.

[FRY, J.:—There the compromise was impeached for fraud.]

There must be mutuality; a compromise cannot be enforced in a proceeding in which the Court could not set it aside.

FRY, J.:—

Leslie's own summons was a proceeding taken by him in the winding-up to assert his rights under his debentures, and to enforce them in the largest possible manner, and it appears to me that he has submitted the determination of his rights to the Court in the winding-up in an application which is still pending. The question is whether I can enforce the compromise as against him in the winding-up, and, in my opinion, I can. The terms of sect. 24, sub-sect. 7, of the *Judicature Act*, 1873, are exceedingly wide. In my judgment the original summons is a matter now pending, and *Leslie* is a party in this sense, that he has submitted the determination of his rights in regard to the debentures to the Court in the winding-up. The present question may be disposed of without prejudice to any rights which he may be advised to set up. It is not alleged that there is any question of fraud or misrepresentation. If there were, it may be that I should not be able to dispose of the whole of the matter on this summons. But, if there is no such question, or no question at all as to the validity of the compromise, it appears to me that I can dispose of the whole matter on the summons. The summons must, however, stand over, to enable *Leslie* to make out, if he can, his case against the validity of the agreement.

Solicitors for Liquidator: *M. Abrahams & Roffey.*
Solicitor for *Leslie: C. F. B. Birchall.*

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(1) 9 Ch. D. 259.

FRY, J.
1879
June 17.

HOLE *v.* BRADBURY.

[1878 H. 91.]

Copyright—Author and Publisher—Publishing Agreement—Assignability—Action for Piracy of Copyright—Notice of Objections to Plaintiffs' Title—Engravings—Delivery up of Blocks—Practice—Application to expunge Registration—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 14, 16, 23, 24.

18 Ch D 81.

The joint authors of a book (one of whom composed the letterpress, and the other sketched the drawings from which the illustrations were engraved) entered into a verbal agreement with a firm of publishers, by which the firm were to engrave the illustrations and to print and publish the book. If the publication resulted in a loss the firm were to bear the whole of it; if there was a profit, they were to pay half of it to the authors. The profits were to be ascertained after deducting the cost of the engraving, printing, and publication, but without allowing any sum to the authors for the illustrations and letterpress. The book was published, and the publication resulted in a profit:—

Held, that the agreement was merely personal to the individuals then composing the publishers' firm, and that the benefit of it could not, without the consent of the authors, be assigned by the publishers' firm to a firm which had succeeded to their business, but which contained none of the partners of the original firm.

Stevens v. *Benning* (1) followed.

The successors of the original firm were accordingly restrained from publishing the book.

The Plaintiffs in the action were the author of the letterpress and the daughter of the other joint author, who was dead. The statement of claim alleged that her father had by his will appointed her mother his sole executrix and universal legatee, and that, she having since died, the daughter had administered to her estate. But it was not alleged that the mother had assented to the bequest made to her by the father. The Plaintiffs had registered themselves at *Stationers' Hall* as joint owners of the copyright of the book, and the Defendants (the successors of the original firm of publishers) had afterwards registered themselves as the owners. At the trial the Defendants objected that the daughter did not represent her father's estate. The objection had not been taken in the statement of defence, and no notice in writing of it had been given to the Plaintiffs under sect. 16 of the *Copyright Act*:—

Held, that the objection could not be relied on at the trial.

The drawings on the blocks from which the illustrations of the book were engraved were sketched by the author of the drawings himself:—

Held, that, having regard to the terms of the agreement, the blocks themselves were not the property of either the Plaintiffs or the Defendants, but that the Defendants must deliver them up to the Plaintiffs.

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(1) 1 K. & J. 168; 6 D. M. & G. 223. 1 Jur ns 874

The Plaintiffs did not in their statement of claim expressly ask that the registration of the Defendants as owners of the copyright might be expunged:—

Held, that an order to expunge that registration could not be made at the trial, but that the Plaintiffs must make a summary application for that purpose under sect. 14 of the Act.

Upon motion by Defendants to vary the decree as to the delivery up of unsold copies:—

Held, that the Plaintiffs not having been the registered proprietors of the copyright at the time the copies were printed, were not entitled to have them delivered up under the 23rd section of the *Copyright Act;* but that the Court had power under its general jurisdiction to order delivery up for destruction of all articles created in violation of the Plaintiffs' rights.

The decree was therefore varied to this extent—that if profits had been made then (with the assent of the Defendants) the copies were to be delivered up to the Plaintiffs; but if no profits, then the copies to be delivered up for destruction.

THIS action was brought by the Rev. *S. R. Hole* and Miss *Ada Rose Leech*, against Messrs. *Bradbury, Agnew, & Co.*, publishers, claiming an injunction to restrain the Defendants from printing, publishing, and selling a book called "*A Little Tour in Ireland*," of the copyright of which the Plaintiffs alleged that they were the sole proprietors.

The statement of claim alleged that in the year 1858 the Plaintiff *Hole* and the late Mr. *John Leech* made a tour together in *Ireland*, and jointly composed a book describing their tour, with the view of publishing the same for their joint benefit. The book was entitled "*A Little Tour in Ireland, by an Oxonian, with Illustrations by John Leech*," and the arrangements for its publication were left in the hands of *Leech*, who was more conversant with such matters than *Hole*. *Leech* employed the firm of *Bradbury & Evans*, who then carried on the business of publishers, to publish an edition of the book, and the book was accordingly published by them in the autumn of 1859 on account of the authors. The publication was so successful that, with the consent of the authors, the book was reprinted almost immediately after the issue of the first edition. *Leech* died on the 29th of October, 1864, without having parted with his share and interest in the copyright of the book, and without having dealt with the same in

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any manner beyond employing *Bradbury & Evans* to publish an edition. *Leech* by his will appointed his widow *Anne Leech* sole executrix, and bequeathed all his personal estate to her for her own use and benefit. She proved the will, and afterwards died intestate. The Plaintiff *Ada Rose Leech* was the daughter and sole next of kin of *Anne Leech,* and had obtained letters of administration to her estate. The Defendants, who were the successors in business of *Bradbury & Evans,* in the latter part of the year 1877, reprinted and republished the book, without the consent of the Plaintiffs or either of them. The Plaintiffs alleged that they were the sole proprietors of the copyright, and that they had caused an entry of the book to be made in the registry of the *Stationers' Company* pursuant to the Act 5 & 6 Vict. c. 45. The original drawings for the illustration of the book were left in the hands of *Bradbury & Evans,* as well as the blocks and plates from which the illustrations for the authorized edition were printed, and which were charged for in account against the authors by the firm of *Bradbury & Evans.* The drawings, blocks, and plates were, when the action was commenced, in the possession of the Defendants as the successors in business of *Bradbury & Evans.*

The Plaintiffs claimed an injunction as above mentioned and consequential relief, including an account of profits made by the Defendants by the sale of the book and payment of the profits so ascertained, and the delivery to the Plaintiffs of all unsold copies of the book and of the original drawings, and all blocks and plates taken from the original drawings and in the possession or power of the Defendants.

The Defendants, by their statement of defence, said that in 1859 *John Leech* offered to sell the book in question to *Bradbury & Evans* in the course of their business upon certain terms, which were accepted by them. These terms were as follows: *Bradbury & Evans* were to engrave the illustrations and to print and publish the book, and if from the publication there should be a loss *Bradbury & Evans* were to sustain the whole of it, but, if there should be a profit, they were to pay *Leech* one half thereof. The profits were to be ascertained after debiting the cost of the engraving, printing, and publication, but without allowing any sum to *Leech* for the illustrations and letterpress. *Leech* had full power as between himself and the Plaintiff *Hole* to enter into the agreement; so far as the letterpress was concerned, the Plaintiff *Hole* had ratified and confirmed it. Immediately on this agreement being come to *Bradbury & Evans*, in pursuance thereof, at their own expense, caused the sketches to be engraved, and printed and published the work, and they had duly paid to *Leech*, or his legal personal representative, all sums which became payable to him or his estate under the agreement in respect of his half part of the profits resulting from the publication. The book was first published in the autumn of 1859, 2000 copies being then printed. Before the end of the year 2000 more copies were printed. The first 2000 copies were sold in the year 1859, but the second 2000 copies were not completely disposed of until 1877. In October, 1859, *Bradbury & Evans*, with the consent and at the instance of *Leech*, sent to the Plaintiff *Hole* as a *douceur* a cheque for 100 guineas, accompanied by a letter from Mr. *F. Mullett Evans*, one of the partners in *Bradbury & Evans*. In reply to which, on the 11th of October, 1859, the Plaintiff *Hole* wrote, "I beg to offer to Mr. *Bradbury* and yourself my sincere thanks for the cheque (£105) which I have received this morning, and which is the most decisive and delightful proof I could have of the success of '*The Little Tour.*' That success is of course mainly attributed to the admirable illustrations of our friend *Leech*—a fact which you should know as well as I do, but which I feel bound to acknowledge gratefully in tendering my thanks to you. Again thanking you for your generosity in which I have every confidence." In May, 1861, *Bradbury & Evans* sent to the Plaintiff *Hole*, as another and final *douceur*, a cheque for £25, the receipt of which the Plaintiff *Hole* acknowledged with thanks. The two sums of £105 and £25 together exceeded the value of the copyright of the letterpress of the book. In fact the value of the book depended entirely on the sketches. The firm of *Bradbury & Evans* was succeeded by the firm of *Bradbury, Evans, & Co.*, which was succeeded by the Defendants' firm. None, however, of the partners in the firm of *Bradbury & Evans* were partners in the Defendants' firm. On the successive changes of firms all the assets, rights, powers, and privileges of the prior firm were assigned and became vested in the succeeding firm, and on these changes and assignments the right of the firm of *Bradbury & Evans* to the book in question and the copyright thereof had been specially treated and paid for by the succeeding firms as an asset of the original firm. On the 16th of February, 1867, a deed was executed between the members of the then firm of *Bradbury, Evans, & Co.*, of the first part, and *Anne Leech* of the second part. This deed contained a recital that certain claims and demands had been made by *Anne Leech*, as executrix of *John Leech*, against the former and the present proprietors of the business of *Bradbury, Evans, & Co.*, in respect of certain rights, interests, claims, and demands which she alleged that *John Leech* had or was entitled to at his death in, upon, or in reference to or connection with the business and the periodical known as "*Punch*" and publications connected therewith or founded thereon, and the partnership property and effects and otherwise, and a recital that certain claims and demands had been made by the present proprietors of "*Punch*" upon *Anne Leech*, as such executrix, in respect of certain claims which they insisted they and their predecessors in the business had against or upon *John Leech* at the time of his death, and that it had been agreed that the persons parties of the first part should pay to *Anne Leech* £1000, and that thereupon the mutual releases thereinafter contained should be executed, and a recital of the payment of the £1000 to *Anne Leech*. The deed then contained a release by *Anne Leech* of the several persons parties of the first part, and also of the former partners in the firm of *Bradbury & Evans*, from all actions, &c., "upon account or in respect of every or any right, interest, claim, or demand at law or in equity which the said *John Leech* had or was entitled to at his decease, or which she has or is entitled to or might hereafter have had or become entitled to as his executrix to, in, or upon, or in anywise in reference to or in connection with the said business or the said periodical, or any publication connected therewith or founded thereon, or the said property or effects (including any property or effects in which the said *John Leech* has claimed or might claim any interest at law or in equity jointly or together with the persons parties hereto of the first part or any of them), or for or upon account or in respect of any act or thing in anywise relating to the premises." And there was also a release by the persons parties of the first part of *Anne Leech* and the estate of *John Leech* from all claims against him or his estate.

The Defendants further alleged that since the year 1859 the firm of *Bradbury & Evans*, and the firms their successors, had (subject, prior to the release of the 16th of February, 1867, to the interest therein of *John Leech* under the agreement of 1859) remained owners of the book and the copyright thereof. They denied the title of the Plaintiffs or either of them to the copyright of the book, and said that, if the Plaintiffs had caused an entry of the book to be made in the registry of the *Stationers' Company*, they had done so improperly, and the entry ought to be expunged. The Defendants had themselves caused an entry to be made in the registry of their being the sole proprietors of the copyright.

By their reply the Plaintiffs joined issued on the statement of defence.

In answer to interrogatories delivered by the Plaintiffs, the Defendants deposed that they believed that the book was printed and published by the firm of *Bradbury & Evans* in accordance with the agreement and on the terms set forth in their statement of defence, and that the book and the copyright thereof became vested in that firm subject to the rights of *John Leech* under the agreement, but the Defendants did not know whether any instrument in writing was ever executed assigning the copyright to the firm.

In answer to interrogatories delivered by the Defendants, the Plaintiff *Hole* deposed that he left the arrangements for the publication of the book in the hands of *John Leech*, who never suggested to him that he was going to sell the book or part with the copyright, and he never gave *John Leech* any authority to do so. The only arrangement between *John Leech* and himself was that they should compose the book together, and that *John Leech* should employ the firm of *Bradbury & Evans* to publish an edition of the book for the joint benefit of himself and *Hole*. *Hole* denied that the sums of £105 and £25 were sent to him as *douceurs*.

There was no evidence of any written assignment of the copyright of the book by the Plaintiff *Hole* or *John Leech*, or either of them, and there was no entry of any such assignment in the registry of the *Stationers' Company*.

It appeared that the registration made by the Plaintiffs was not made till after the third edition of the book had been printed in 1877.

The Defendants admitted that profits had been made by the publication and sale of the book.

Macnaghten (*North*, Q.C., with him), for the Plaintiffs.

Cookson, Q.C., and *Romer*, for the Defendants, took the objection that there was nothing to shew that the Plaintiff Miss *Leech* represented the estate of her father. She only shewed that she was administratrix to her mother's estate.

Macnaghten:—This objection is not taken in the statement of defence, and no notice has been given of it. The Defendant in such an action cannot at the trial rely on any objection to the Plaintiff's title, of which he has not given notice in writing before the trial: 5 & 6 Vict. c. 45, s. 16.

Cookson:—That section does not apply; the Plaintiff is bound to complete her own title. She might have done so at the time, and we could not, therefore, take the objection before. The affirmative is on the Plaintiff. Sect. 16 did not intend that a Plaintiff coming with a manifestly incomplete title should be able to cure it by the Defendant's omission to take the objection before the trial.

[FRY, J.:—I need not decide the point now, because the objection applies only to Miss *Leech*, and does not affect her co-Plaintiff's right to relief.]

Macnaghten:—Sect. 2 gives Miss *Leech* the right to represent her father's estate, as being his "next of kin entitled to administration." Sect. 25 makes copyright personal property. An assignment of copyright must be made by entry on the register: sect. 13; or there must be an assignment in writing: sect. 15; *Leyland* v. *Stewart* (1). No assignment in either of these ways is alleged by the Defendants.

[He was stopped by the Court.]

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(1) 4 Ch. D. 419.

Cookson, Q.C., and *Romer*, for the Defendants:—

The presumption arising from registration may be rebutted. The Plaintiff Miss *Leech* has so stated her case as to rebut her *primâ facie* title. The administratrix of an executor does not represent the original testator.

[Fry, J.:—I do not see how a mere defect of statement can rebut the *primâ facie* title.]

At any rate the release of the 16th of February, 1867, gives us a right to publish the book, and that is a sufficient defence to the claim for an injunction. In that deed Mrs. *Leech* is described as executrix of *John Leech;* that shews that she was not then entitled in her own right, and that the testator's debts could not then have been paid. She released any right which *John Leech* had, and that coupled with the original agreement with *Bradbury & Evans* is sufficient to estop Miss *Leech.* If the original agreement was a mere publishing agreement it does not follow that such an agreement is necessarily not assignable: *Stevens* v. *Benning* (1); *Reade* v. *Bentley* (2); *Howitt* v. *Hall* (3); *Sweet* v. *Cater* (4). But the true construction of the agreement is that it amounted to a sale of the copyright, the arrangement being that *John Leech* was to receive half the profits arising from the sale of the work, and that the Plaintiff *Hole* was to receive a lump sum. There is nothing to shew that the right of publication was to be limited in any way, and this distinguishes the case from *Reade* v. *Bentley.* It is an assignment of the absolute right to publish the book, and that is equivalent to an assignment of the copyright.

At any rate we are entitled to retain the blocks from which the engravings were printed, as we provided them.

North was called on to reply only as to the blocks:—

The drawings upon the blocks were made by *John Leech* himself, and were his property; the value of the blocks themselves is insignificant.

[Fry, J., referred to *Prince Albert* v. *Strange* (5).]

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(1) 1 K. & J. 168; 6 D. M. & G. 223.

(2) 3 K. & J. 271.

(3) 10 W. R. 381.

(4) 11 Sim. 572.

(5) 2 De G. & Sm. 652.

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Moreover, by the original agreement the profits were to be ascertained after debiting (*inter alia*) the cost of engraving; the cost, therefore, of the blocks is allowed for in estimating the profits.

[FRY, J.:—That does not make the blocks the Plaintiffs' property.]

Nor does it make them the Defendants' property. They were paid for out of a common fund, and they ought to be delivered up to us, inasmuch as the Defendants have been making an improper use of them.

FRY, J.:—

It seems not to admit of doubt that Canon *Hole* and Mr. *Leech* were originally entitled to the copyright of the book called "*A Little Tour in Ireland;*" and the question, therefore, is whether they have parted with it to the present Defendants. Was there any assignment of the copyright by the authors of the book to Messrs. *Bradbury & Evans?* The burden of proving such an assignment rests with those who assert it, and it appears to me to be clear that for such an assignment to be valid it must be made in writing, or, if made by a registered proprietor, it must be proved by means of an entry in the book kept at *Stationers' Hall* for that purpose. That follows from the decisions upon the statute of *Anne*, and from the recent decisions upon the Act 5 & 6 Vict. c. 45, regulating copyright. Both those statutes require that a license to print shall be in writing, and the Courts have held, I think with great reason, that if a license to print must be in writing, an assignment of copyright, which is in fact a perpetual license, must also be in writing. It appears to me, therefore, to be clear that, no writing being produced, and no entry in the book at *Stationers' Hall* being put in evidence, no assignment by the original owners of the copyright has been made to the Defendants.

The next question is this, has there been any agreement by which the present Plaintiffs have deprived themselves of the right of asserting their title to the copyright of the book? because, as has been said by the learned counsel for the Defendants, although there may not be an assignment in writing, there may have been an agreement which would furnish a valid defence against the present action. In considering that question, I must have regard to what is set up by the defence, which is this, that, after the work had been prepared, Mr. *Leech* offered to sell the book to the firm of *Bradbury & Evans*, which then consisted of Mr. *Bradbury* and the late Mr. *Mullett Evans*. [His Lordship stated the agreement between *John Leech* and Messrs. *Bradbury & Evans* mentioned in the statement of defence, and continued:—]

That statement of the agreement is supported by the answer to interrogatories which has been sworn to by the Defendants, who represent the present firm of *Bradbury, Agnew, & Co.*, and it appears that they have entries in their books from which they infer what the nature of the agreement was, and that it was in similar terms to those which are given in the statement of defence. It is not a little remarkable that in stating that agreement they do not allege that it was an agreement for the sale of the copyright; they use the ambiguous words "agreement for the sale of the book;" and it is also not a little remarkable that when they come to state the terms upon which they say the transaction took place between Mr. *Leech* and themselves, no one of the terms mentioned involves the sale of the copyright or the sale of the book. But, passing by those observations, it remains to inquire whether this agreement, supposing it to be proved, is one which gave the firm the copyright in the book. In my judgment it did not. It is to be observed that there is no consideration of any gross payment, no sum of money is paid down; but, on the contrary, the sole remuneration of the authors is to be derived from a share of the profits of the book as published by the firm of *Bradbury & Evans*. Now, if the copyright had passed, it would have placed it in the absolute power of that firm and their successors to publish or not to publish the book, as they should be minded, to produce profits or to produce none: and therefore the authors of the book would have been selling their work under an agreement which placed it in the power of the purchasers to pay nothing whatever for it. Such an agreement appears to me so unreasonable that I cannot come to the conclusion that the copyright in the work passed to the Defendants.

In coming to the conclusion I have stated, I am greatly fortified

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in opinion by the observations of Lord *Hatherley*, when Vice-Chancellor, in *Stevens* v. *Benning* (1). There there was an agreement by which Mr. *Forsyth*, the eminent lawyer, had agreed that his well-known work on Compositions with Creditors should be published by the firm of *Saunders & Benning*, and he provided for revising the work from time to time as required for the various editions. The question arose whether that agreement carried the copyright or not, and Lord *Hatherley* said (2): "No doubt if an author, in consideration of a sum of money paid to him, agrees that certain persons shall have the sole power of printing, reprinting, and publishing a certain work for all time, that would be parting with the copyright; but if the agreement is that the publishers, performing certain conditions on their part, shall, so long as they do perform such conditions, have the right of printing and publishing the book, that is a very different agreement." In the present case it appears to me that there is an implied condition on the part of the publishers that they shall publish the book, so that a profit shall be produced, and that condition would be defeated if the absolute copyright passed to them.

It remains to inquire whether the present Defendants have any right of publication under the agreement, assuming it to be proved by the Defendants? In the year 1859, when the agreement was made, the firm of *Bradbury & Evans* consisted of two partners, Mr. *Bradbury* and Mr. *Mullett Evans*. Both those gentlemen are now dead. Subsequently to 1859 the firm of *Bradbury & Evans* was succeeded by the firm of *Bradbury, Evans, & Co.*, which consisted of Mr. W. H. Bradbury, Mr. *Moule Evans*, ~~who was the son of Mr. *Mullett Evans*,~~ and [illegible] and three gentlemen of the name of *Agnew*, and that firm has again been succeeded by the present firm of *Bradbury, Agnew, & Co.*, consisting of the present Defendants, who are the same persons as the partners in *Bradbury, Evans, & Co.*, except that Mr. *Moule Evans* has retired from the partnership. The present firm, therefore, contains no member of the firm with whom Mr. *Leech* made the contract in 1859.

Now *Stevens* v. *Benning* is again an important authority to shew that the agreement made in this case was upon personal considerations. The publication of the book was entrusted to the personal

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(1) 1 K. & J. 168.

(2) 1 K. & J. 174.

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skill and ability of Mr. *Bradbury* and Mr. *Mullett Evans*, and it was not competent for them to pass on the right which they acquired under the agreement to a firm in which neither of them was a partner. That appears to me, I confess, to be perfectly good sense, but at any rate it appears to me to be perfectly good law and in conformity with the decision in *Stevens* v. *Benning* (1). The Defendants' firm therefore can take nothing under the agreement.

So much for the defence as against Canon *Hole*. Then it is said that as against Miss *Leech* the Defendants have some other special defences. The first of them is this. Miss *Leech* claims under her father, he having been one of the original owners of the copyright, and the statement of claim alleges that he died having made his will and appointed his wife his sole executrix and universal legatee; that she proved the will and died in 1868; and that Miss *Leech* then obtained letters of administration to her mother's estate. It further alleges the registration of the Plaintiffs at *Stationers' Hall* as owners of the copyright, and the statute, it is to be observed, makes that *primâ facie* evidence of the Plaintiffs' title. It is said that Miss *Leech* cannot have the relief which she asks because she is not the legal personal representative of her father. Two replies have been given to that objection. First, that the registration at *Stationers' Hall* is in itself *primâ facie* evidence of her title, and that, I confess, appears to me a good answer. In the next place reliance is placed on the 16th section of the Act (5 & 6 Vict. c. 45), which if the nature of the defence be that the Plaintiff in the action is not the proprietor of the copyright, or that some other person is the proprietor, requires that the Defendant shall specify in a notice the name of the person whom he alleges to be the proprietor of the copyright, otherwise the Defendant shall not at the trial be allowed to give any evidence that the Plaintiff was not the proprietor of the copyright, and at the trial no other objection shall be allowed to be made on behalf of the Defendant than the objections stated in such notice, or that any other person was the proprietor of the copyright than the person specified in such notice. Now here the defence has not taken the objection that Miss *Leech* was not entitled to represent her father, and, not having taken that objection, it appears to

(1) 1 K. & J. 168.

me that the section applies, and that the objection cannot now be taken. It is said, indeed, that the 16th section cannot apply where the Plaintiff himself by his statement of claim shews that he has no title. That may well be, but I express no opinion upon it, because here the statement of claim is not inconsistent with Miss *Leech's* title; there is only one allegation wanting, viz., an allegation of the assent by Mrs. *Leech* to the bequest to her to make Miss *Leech's* title perfect. There is no inconsistency therefore in the statement of claim with Miss *Leech's* title, but only an omission in respect of Mrs. *Leech's* title. That objection, therefore, in my judgment, fails.

In the next place it is said that the release executed by Mrs. *Leech* on the 16th of February, 1867, either made that agreement originally entered into by Mr. *Leech* with the firm of *Bradbury & Evans*, which in its nature was not capable of being assigned to the new firm, capable of assignment, or that it ratified the assignment which had been made to the new firm. I am not sure whether I correctly state the argument, for I confess that I do not understand it, and, therefore, perhaps I am not doing justice to it. But it appears to me that the release had no such operation or effect. The intention of the release was only to abandon certain rights of suit which Mr. *Leech* had against the firm, arising out of certain transactions between him and them, which had nothing to do with this matter. Therefore that ground of defence equally fails.

There remains only one other question, which is as to the right of the Plaintiffs to recover the blocks upon which Mr. *Leech* exercised his ingenuity and skill in drawing. Those blocks must be delivered up to the Plaintiffs, for I think that the argument which has been addressed to me by Mr. *North* in reply ought to prevail. The drawings undoubtedly were the property of Mr. *Leech*; he traced them with his own hand, and in my view he never parted with the property in them. The blocks were supplied to him by a Mr. *Swaine*, who was paid by the firm of *Bradbury & Evans*. But the blocks were paid for, according to the agreement which has been sworn to by the Defendants, out of the proceeds of the sale of the book. The drawings therefore remained the property of the owners of the copyright, and the blocks were

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not the property of Messrs. *Bradbury & Evans.* Moreover, in my judgment, an injury has been done by means of these blocks to the Plaintiffs by the Defendants, in their having used them for their edition of 1877, which, as it appears to me, they had no right to do. I must bear in mind also the very small value of the wood in comparison with that of the drawings. I think I should not be doing full justice to the Plaintiffs if I did not direct the delivery up to them of the blocks.

The result is, that I grant a perpetual injunction to restrain the Defendants from printing the book, and an account of profits, the Plaintiffs electing to take that instead of damages. The unsold copies must be delivered up to the Plaintiffs, and the Defendants must pay the costs of the action.

North asked for an order to expunge the registration of the Defendants as proprietors of the copyright: sect. 14 of the Act.

FRY, J.:—

This is really an *ex parte* application, as you have not asked for it in your statement of claim. If you had asked for it, perhaps I could have made the order now. You must apply by motion or summons under sect. 14.

July 25. A motion was now made on behalf of the Defendants that the decree made on the hearing as to the delivery up to the Plaintiffs of the unsold copies of the third edition might be varied to this extent, that if upon taking the accounts it should appear no profits had been made, then that there should be no order upon the Defendants to deliver up the unsold copies, but it was admitted that if any profits had been made, then the Defendants would deliver up the copies to the Plaintiff.

Romer, in support of the motion:—

The Plaintiffs have no right to the delivery up of the unsold copies under the 23rd section of the *Copyright Act* (5 & 6 Vict. c. 45); that is a penal section, and must be construed strictly. It provides that all copies of any book wherein there shall be copyright which shall have been unlawfully printed, shall be deemed to be the property of the proprietor of the copyright who shall be registered as such. In this case the proprietor of the copyright was not registered as such at the time the unsold copies were printed, and he cannot sue under that section. It is true that the person entitled to the copyright is given power to sue under the 24th section if he is registered before commencing the action, but that applies only to his right to sue for an infringement of copyright, and has no reference to delivery up of the copies.

Macnaghten, for the Plaintiffs :—

The proprietor of a copyright is entitled, under the 23rd section of the Act, to have these copies delivered up, and it is sufficient that the copyright be registered before the action is brought. If he has a right to protect his copyright, he has the same right to protection by having the unsold copies delivered up. In the case of *Delfe* v. *Delamotte* (1), and in *Stannard* v. *Harrison* (2), unsold copies of a book were ordered to be delivered up. But it is too late now for the Defendant to raise this objection, as by the 16th section of the Act he should have given notice of any objections upon which he meant to rely. Then if the Court cannot order the delivery of the copies under the *Copyright Act*, still it has a general power to order the destruction of all copies of a book which have been printed in derogation of the rights of the proprietor of the copyright. That is the effect of the decisions in *Prince Albert* v. *Strange* (3) and *Emperor of Austria* v. *Day* (4).

Romer, in reply :—

The 16th section of the *Copyright Act* does not apply to this case, as that section refers only to objections to title, and we do not deny the Plaintiffs' title to the copyright. We say that as the Plaintiffs did not register their copyright they lose the right to the copies.

Fry, J. :—

This is a motion to vary the minutes of the judgment pronounced by me at the trial of the case. The motion has been admitted to be untenable in the terms in which it was brought

(1) 3 K. & J. 581.
(2) 19 W. R. 811.
(3) 2 De G. & Sm. 652.
(4) 3 D. F. & J. 217. 7 Jur. N.S. 63

before me, but what has really been asked is that if it should appear that no profits have been made by the sale of the book, then no order to deliver up the copies of the book should be made; but it is conceded that if any profits have been made, the order to deliver up the copies should stand. Why that concession has been made it is not for me to inquire, but having been made, I think myself at liberty to hold the applicant to it.

The argument before me has taken a much wider range than the mere notice of motion perhaps justifies, in fact the point has been fully argued whether the Court can order the delivery up of the copies in this case. The difficulty arises under the 23rd section of the 5 & 6 Vict. c. 45, and from the fact that the Plaintiffs, at the time of the printing of this book, were not the registered owners of the copyright. That section enacts that "all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover." Now it must be borne in mind in construing this section that "copyright" does not mean the right to these copies. "Copyright," as defined by the Act, means the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied. The right to the copies which may be asserted by an action of detinue or of trover is a perfectly distinct right from the right to multiply copies which may be asserted by an action or by injunction.

In the next place, it must be observed that the words of the section seem to be clear to shew that the only person who is entitled to maintain this action of detinue or trover for the copies is a person who is the registered proprietor. That appears from several passages in the section. The very first words which introduce it, "All copies of any book wherein there shall be copyright and of which entry shall have been made in the registry book," appear to me, on the face of them, to refer to an entry made in the registry book at the time of the creation of the copies; and then the section goes on throughout to speak of the registered proprietor as the person who is entitled to the right.

To that conclusion from the 23rd section two answers have been given. In the first place, it is said that the 24th section removes the difficulty, because that provides that "No proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit at law or in equity, or any summary proceeding in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the *Stationers' Company*." Then it provides "that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof, as aforesaid." It appears to me, however, that the meaning of that clause is only to require registration as a condition precedent to suing in respect of the copyright, and that it has nothing to do with the question whether registration is or is not a condition precedent to suing in respect of the copies, and therefore it leaves the 23rd section untouched.

The next answer attempted was on the 16th section, which provides that "after the passing of this Act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale, or hire, or causing to be imported, sold, published or exposed to sale or hire any such book," the defendant in effect must plead the particulars, and it has been said that not having pleaded here the non-registration before the printing of the copies, he is precluded by the 16th section; but that section appears to me to apply only to actions for copyright, and not to actions for detinue or trover asserting the right to the copies. The result is that, in my judgment, the Plaintiffs not having been the registered proprietors at the time of printing this book, are unable to maintain their right to have these copies delivered up to them for their own benefit under the 23rd section.

There remains this question, Whether there is any authority in the Court, independently of the statute, to cause to be delivered up any copies which may have been printed, even to a person who is not the registered proprietor at the time they were printed, simply from the general jurisdiction of the Court to order delivery up for destruction of all articles which have been created in violation of the Plaintiffs' rights. It appears to me that there is distinct authority in favour of that view. I find that, in the case of *Prince Albert* v. *Strange* (1), the Court ordered the delivery up of the copies which had been there piratically printed to the Record and Writ Clerks for the purpose of destruction; and I find that in the case of *Kelly* v. *Hodge* (2), which was before Vice-Chancellor *James* in 1870, before the passing of the Judicature Acts, the Court ordered delivery up to the Plaintiffs for the purpose of destruction—a delivery up which could not have been under the 23rd section of the Act, because that section gave an express action at law and did not enlarge the jurisdiction of the Court at all. I bear in mind, further, the analogy to the numerous cases which have arisen where the defendant has violated either the patent rights of the plaintiff or the right to the trade-mark of the the plaintiff, or, as in the case of *Emperor of Austria* v. *Day* (3), the sovereign rights of the plaintiff; in all those cases the Court has delivered up the copies for destruction.

I will only make this one other observation, that, although I do not think, upon the construction of the statute, that I can order the delivery up for the Plaintiffs' benefit of the copies which were printed in the manner I have mentioned, yet there do appear to be two authorities in favour of his contention that they might be so delivered up. One is the case of *Delfe* v. *Delamotte* (4), where I am unable to reconcile the judgment with the order made, because it appears that the Vice-Chancellor expressed his opinion that the plaintiff must proceed at law if he desired delivery up of the copies; but the order stated in *Kay* and *Johnson's* Reports, and referred to in *Seton* on Decrees, was for delivery to the plaintiff; and I think, further, in the case of *Stannard* v. *Harrison* (5),

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(1) 2 De G. & Sm. 652.
(2) Seton, 4th Ed. vol. i. p. 244.
(3) 3 D. F. & J. 217. 7 Jur. N. S. 639
(4) 3 K. & J. 581.
(5) 19 W. R. 811.

Vice-Chancellor *Bacon* upheld the decree by consent for delivering up the copies, holding that the whole of the decree was within the power of the Court. Notwithstanding those authorities, I think the Act is so clear that I ought not to order the delivery up to the Plaintiffs for their benefit, except in cases in which the Defendant has conceded that they ought to be so delivered up. Therefore the order which I shall make will be this—That if on taking an account it appears that there are profits, then in a week after the date of the Chief Clerk's certificate the Defendants are to deliver up to the Plaintiffs those copies—that is the order I make on the concession of the Defendants, and not as of right; but if it shall appear there are no profits, then the Defendants are to deliver up the copies to the Plaintiffs to be destroyed. I shall make the costs of this motion costs in the cause. The order will be dated to-day.

Solicitor for Plaintiffs: *S. G. Turner.*
Solicitors for Defendants: *Chester & Co.*

In re JOHNSON. *Ex parte* WIGG.

C. J. B.
1879
May 12, 19.

Adjudication of Bankruptcy—Appeal—Person aggrieved—Limit of Time for appealing—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Bankruptcy Rules*, 1870, *r.* 143.

The limit of time for bringing an appeal fixed by rule 143 of the Bankruptcy Rules, 1870, applies equally to all "persons aggrieved," whether parties to the order or not. An order of adjudication, duly made, and not appealed against for twenty-one days, is good against all the world.

22 Ch D 436-7

THIS was an appeal from the County Court at *Norwich*. *Petitt Johnson*, the debtor, a farmer and cow-keeper, held a farm at *East Dereham*, in the county of *Norfolk*, from the Appellant, *Charles Heyhoe Wigg*, at a rental of £403 per annum.

On the 26th of November, 1878, the debtor absconded, and on the 29th of November the Appellant *Wigg* put in a distress for rent, and on the same day a bill of sale holder took possession of the debtor's effects under a registered bill of sale.

On the 5th and 6th of December the debtor's property was sold, and a sum of £527 was paid to the Appellant for arrears of rent and costs.

On the 14th of December the order of adjudication was made on the petition of another creditor, the act of bankruptcy alleged being that "the debtor being a trader, to wit, a cow-keeper," had departed from his dwelling-house or otherwise absented himself. This order was duly advertised in the usual way in the *London Gazette* of the 17th of December. On the 4th of January, 1879, a trustee was appointed; on the 7th of January the trustee applied to the Appellant to refund so much of the £527 as was in excess of what he was legally entitled to.

The trustee's claim being disputed, an order dated the 22nd of March, 1879, was obtained by the trustee directing the Appellant to pay over to the trustee a sum of £103 out of the £527.

On the 29th of March the Appellant gave notice of motion to review and rescind the order of adjudication of the 14th of December, 1878, upon the ground that the bankrupt was not a trader. This motion was dismissed with costs on the 7th of April.

Wigg appealed, and notice of motion for appeal was served on the trustee's solicitors on the 18th of April, 1879. This notice of motion was stated to be on behalf of *C. H. Wigg* "(a person aggrieved by the orders hereinafter mentioned, some or one of them, namely, the order of adjudication of bankruptcy" of the 14th of December, 1878, an order made in this matter on the 22nd day of March, 1879, for the payment by the said *C. H. Wigg* to the trustee in the above matter of the sum of £103 and certain costs, and an order "made the 7th day of April, 1879, by which the motion made to the said Court on behalf of the said *C. H. Wigg* to review and rescind the order of adjudication was dismissed with costs) for a rehearing by way of appeal against the said order dated the 7th day of April, 1879."

Cozens-Hardy, and *H. R. Knipe*, for the Appellant:—

Wigg was not a party to the order of adjudication, and until the order of the 22nd of March was made directing him to refund £103 to the trustee he could not be said to be a "person aggrieved." On the facts before him on the 22nd of March the County Court Judge could not well have made any other order, but when that order was made, the only course open to the Appellant was to try and upset the adjudication on the ground that it had been improperly made, and this he did without any loss of time on the 7th of April. The Appellant is now clearly a "person aggrieved" within the meaning of the *Bankruptcy Act*, 1869, s. 71, and the limit of twenty-one days for bringing an appeal fixed by rule 143 of the Bankruptcy Rules, 1870, would appear from Lord Justice *James*' remarks in *Ex parte Learoyd* (1) to apply only to the parties to the order. The Appellant too has a direct interest in the matter and has a *locus standi* to be heard: *Ex parte Thoday* (2).

[The rest of the argument was then addressed to the question of fact and law, as to whether the bankrupt was a trader or not, which in the result did not become the subject of decision.]

Roxburgh, Q.C., and *Finlay Knight*, for the Respondent:—

It is too late now to appeal against the adjudication, and that

(1) 10 Ch. D. 3, 6.

(2) 2 Ch. D. 229, 797.

is what the Appellant is really doing, although in form his appeal professes to be against the order of the 7th of April. *Ex parte Learoyd* (1) is only an authority for this, that although everyone is bound by notice in the *Gazette*, every person aggrieved by the adjudication may appeal within twenty-one days, and is no authority for the statement that a person not a party to the order can appeal after twenty-one days.

[They were stopped by the Court.]

Cozens-Hardy, in reply on the question of time:—

We are appealing from the order of the 7th of April refusing our motion to rescind the adjudication; time can only run from the date of the order by which the person is aggrieved.

Bacon, C.J.:—

In my opinion the Appellant is not in time. The statute says—and the Lords Justices, in *Ex parte Learoyd*, have adopted what it says in all its rigour—that after twenty-one days the order of adjudication is good against all the world. The Appellant has had full notice of this adjudication throughout, as it has been advertised in the *Gazette* in the usual way; and although he had distrained for his arrears of rent, the amount for which he could so distrain is regulated by the provisions of the *Bankruptcy Act*. The *Bankruptcy Act* is invoked by the trustee, and an order of the 22nd of March, which is unassailed and unappealed from, is made, directing him to refund £103 to the trustee, and then, and not till then, he comes to the Court and claims as a "person aggrieved" to have the order of adjudication reviewed and rescinded. If I were now to allow this appeal, this absurd consequence would follow, that the order of the 22nd of March would remain good and yet there would be no adjudication. Relying on the decisions in *Ex parte Learoyd*, I feel bound to hold here, that no appeal from the order of adjudication having been brought within the time limited by the 143rd rule, that order is binding upon all. I cannot make a different rule for persons parties to an order for adjudication, and persons not

(1) 10 Ch. D. 3.

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parties. Therefore, without deciding the question as to whether the bankrupt in this case was a trader or not, I dismiss this appeal with costs on the ground that it comes too late.

Solicitors for the Appellant: *Johnson & Master*, agents for *J. B. Coaks & Co., Norwich.*

Solicitors for the Respondent: *Whites, Renard, & Co.*, agents for *M. S. Emerson, Norwich.*

C. J. B.
1879
July 28.

Ex parte CARTER. *In re* THREAPPLETON.

Bill of Sale—Registration—Setting forth of Consideration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10, *sub-s.* 2.

15 Ch D 424
49, 55
6 QBD 297
21 Ch D 949

A bill of sale, dated the 10th of January, 1879, recited that in the month of June preceding the mortgagor applied to the mortgagee for a loan of £340, which the mortgagee consented to make on the mortgagor agreeing to execute a bill of sale, when called upon to do so, of certain chattels; and that in the month of July following the mortgagor applied for a further loan of £60, which the mortgagee agreed to make, on the condition that the advance should be secured in like manner.

The facts were, that a sum of £73 on the 3rd of March, 1878, another sum of £60 on the 6th or 7th of April, 1878, and a third sum of £107 on the 26th or 27th of April, 1878, were severally advanced by the mortgagee to a partnership firm, consisting of the mortgagor and another person. On the 8th of June, 1878, the partnership was dissolved, the mortgagor taking over the assets, and undertaking in an informal way to indemnify his late co-partner against the debts of the partnership, of which the above £240 remained one. On the 14th of June, 1878, the mortgagee advanced £100, and on the 16th of July he advanced the remaining £60 to the mortgagor alone:—

Held, that the consideration for which the bill of sale was given was not "set forth" therein sufficiently to satisfy the requirement of the *Bills of Sale Act*, 1878; and that the bill of sale was void.

THIS was an appeal from an order of the *Huddersfield* County Court.

On the 10th of January, 1879, *Joseph Paget Threappleton* executed to *John Hird* a bill of sale of "all those two pairs of mules with wheels and shafting, together with all the gas-piping, scales, safe, desk, fixtures and fittings, and the stock of yarn made up and in process of manufacture, and all other goods, chattels, and effects

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in and about the premises occupied by the said *J. P. Threappleton,* situate in the second storey of *Field Mill,* in *Leeds Road,* in *Huddersfield* aforesaid; and also the stock-in-trade, woollen pieces, and other effects in and about the warehouse occupied by the said *J. P. Threappleton,* situate in *Hurst's Buildings, Cloth Hall Street,* in *Huddersfield,*" to secure the repayment of £400 and interest.

The recitals in the deed were as follows:—

> "Whereas in the month of June last the said *Joseph Paget Threappleton* applied to the said *John Hird* to lend to him the sum of three hundred and forty pounds, which he consented to do, on the said *Joseph Paget Threappleton* agreeing to execute a bill of sale when called upon so to do of the machinery and stock-in-trade hereinafter described; And whereas in the month of July last the said *Joseph Paget Threappleton* applied for a further loan of sixty pounds, which he, the said *John Hird,* agreed to make, on the condition that the same should be secured in like manner as the said sum of three hundred and forty pounds so lent as aforesaid; And whereas the said *John Hird* has since called upon the said *Joseph Paget Threappleton* to refund the said sums of three hundred and forty pounds, and sixty pounds, making together the sum of four hundred pounds; but the said *Joseph Paget Threappleton* being unable to pay the same, hath consented to enter into this present security, in accordance with the said agreement."

The attestation clause at the foot of the deed was as follows:—

> "Signed, sealed, and delivered by the said *J. P. Threappleton* and *John Hird* in the presence of me; and before the execution hereof I read over this deed to and explained the effect thereof to the grantor;—*Alfred Sykes,* solicitor, *Huddersfield.*"

A copy of the deed was duly filed with the Registrar within seven days, together with an affidavit made on the 13th of January, 1879, by *Alfred Sykes,* the attesting witness, in the following terms:—

> "I, *Alfred Sykes,* of *Huddersfield,* in the county of *York,* solicitor, make oath, and say as follows:
>
> "That the paper writing hereunto annexed is a true copy of a bill of sale made or given by *Joseph Paget Threappleton* to *John*

Hird, of *Alfred Street*, in *Huddersfield*, in the county of *York*, commission agent, and of every attestation of the execution thereof;

"That the said bill of sale was made or given on the 10th day of January instant, being the day of the date thereof;

"That I was present, and did see the said *Joseph Paget Threappleton* sign and execute the said bill of sale, and that the said *Joseph Paget Threappleton* resides at No. 7, *Victoria Terrace, Deighton*, near *Huddersfield* aforesaid, and is a yarn spinner;

"That the name, *Alfred Sykes*, subscribed as a witness attesting the execution of the said bill of sale, is in my proper handwriting, and that I reside at *Huddersfield* aforesaid, and am a solicitor."

The facts relating to the loan were as follows:—

The grantor, *Threappleton*, who afterwards became the liquidation debtor, from 1875 to 1878 was in partnership with one *Barker Elliot Oldfield* as yarn spinners. The firm carried on business at *Field Mills, Leeds Road, Huddersfield*, and also in *Cloth Hall Street*. The debtor was the lessee of *Field Mills* under two tenancies, one from the *Field Mills Company*, the other from a Mr. *Robinson*, who was the owner of the whole, and had leased a portion to the company.

On the 5th of March, 1878, *Threappleton* and *Oldfield* had an interview with *Hird*, who was Mrs. *Threappleton's* trustee. After some conversation *Hird* agreed to advance to the firm £73 on the promise of a security on "the machinery and anything else in the No. 2 room" of *Field Mills* mill. The money was advanced accordingly, and in the course of business was paid away on behalf of the firm.

On the 6th or 7th of April, 1878, *Hird* advanced £60 to *Threappleton* on behalf of the firm, and this sum was paid away in like manner.

On the 26th or 27th of April a further sum of £107 was advanced by *Hird*, upon an agreement that the firm should give as security whatever the before-mentioned room contained. In the course of May, *Hird* applied several times for the promised security, but *Threappleton* put him off, saying it would damage the credit of the firm, and that the money was all right.

On the 8th of June *Threappleton* and *Oldfield* dissolved partnership, on the terms verbally agreed or understood between them, that *Threappleton* should keep the assets, and indemnify *Oldfield* against the debts of the firm.

On the 14th of June a further advance of £100, and on the 16th of July a further and final advance of £60 was made by *Hird* to *Threappleton.* The five advances together made up the £400.

The bill of sale was executed on the 10th of January, 1879, under pressure by *Hird.* On the 24th a distress was levied by the landlord, and on the same day *Hird* took possession; and the liquidation petition was filed.

The trustee in the liquidation objected to the validity of the bill of sale, on the grounds that the consideration for the deed was not duly set forth therein, as required by sect. 8 of the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), and that the deed was not duly registered.

On the 23rd of June last, a motion on behalf of the trustee for an order directing *Hird* to pay to the trustee the proceeds of sale of the chattels comprised in the bill of sale, and directing the bill of sale to be set aside and declared void, was dismissed by the County Court Judge.

This was the order appealed from.

E. Cooper Willis, and *Finlay Knight,* for the Appellant, the trustee:—

As to the registration, the statute provides, sect. 10, sub-sect. 2, that there shall be filed, with the bill of sale and with a copy of the bill, an affidavit of, amongst other things, its due execution and attestation. This affidavit does not state in terms that explanation of the deed (which is a necessary part of its due execution and attestation) was made to the grantor. The solicitor does not expressly say "I explained the deed to the grantor;" and he does not say that the statement in the attestation clause is a true statement.

BACON, C.J.:—

The affidavit states that the paper writing annexed is a true copy of the bill of sale, and of every attestation of the execution thereof. Then, when the attestation clause is looked at, the statement is found that the deed was read over and explained. I think that the affidavit of the due execution and attestation of the deed is, under the circumstances, sufficient.

Willis and *Knight*, in continuation:—

The recitals in the deed do not properly set forth the consideration for which the bill of sale was given, within the 8th section. It is not true that £400 was advanced to the debtor; £240 of it was advanced to the debtor and his partner. Neither is it true that £340 was advanced in June, 1868; £240 of it was advanced in three sums at intervals during March and April.

Under the *Act for Registration of Deeds of Grants of Annuities*, 1777 (17 Geo. 3, c. 26), which provides (sect. 3) that in every such deed the consideration shall be "fully and truly set forth and described," and if not, that the deed shall be null and void, it was held that a statement that the consideration was so much in money paid, when the real consideration was part in money and part in giving up a former annuity, was held fatal to the deed: *Washburn* v. *Birch* (1), Lord *Kenyon* observing, "The objection is not that the consideration for the annuity is not a good one, but that it is not truly stated in the memorial."

[They referred to *Watts* v. *Millard* (2).]

Winslow, Q.C., and *Yate Lee*, for the Respondent, the bill of sale holder:—

The recital is a fair statement of the consideration, and is drawn in terms which a conveyancer, with these facts before him, would ordinarily employ. It is the fact that *Hird* entered into a new agreement with *Threappleton*. There was, in truth, a novation of the debt, *Hird* consenting to take *Threappleton* instead of the firm as his creditor for the £240.

The language of the *Annuity Act* is in terms more stringent than that of the new *Bills of Sale Act;* but, admitting that the two enactments do substantially amount to the same thing, it has been held that the Court will not be astute to set aside an honest transaction, the nature of which has been described in the deed with reasonable fairness: *Symmons* v. *Mortimer* (3).

(1) 5 T. R. 472.

(2) 5 T. R. 598.

(3) 5 T. R. 139.

BACON, C.J.:—

I have listened with great respect and interest to Mr. *Winslow's* argument, and if that argument could have the effect of repealing an Act of Parliament, my decision might have been different from what it is. But the provisions of the Act of Parliament must be complied with. The intention of the Legislature in passing the Act was to endeavour to have a stop put as far as is practicable to the fraudulent practices of lenders of money, and but for that object the provisions of the Act would perhaps not have been so severe and so strong as they are. Public policy requires that the enactments of the statute shall be regarded with the utmost strictness.

The new *Bills of Sale Act* contains directions which are as plain as can be. The 8th section enacts that "Every bill of sale . . . shall be duly attested, and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale . . . shall be deemed fraudulent and void;" and then the 10th section states distinctly the steps which are necessary in order that the attestation and registration may be valid. It says, "A bill of sale shall be attested and registered in the following manner;" and then follow the sub-sections which have been read.

Now in construing this statute the analogy of the Annuity Acts applies. The statement of the consideration for which the bill of sale was given must be a true statement, otherwise the bill of sale will be void. Courts of law have striven, and have often gone very far in their endeavour to prevent the failure of a deed from the circumstance of the consideration not having been fully stated. If the grant of the annuity be an honest transaction, the deed will not be set aside merely in consequence of some defect in the recitals. The inclination of the Court has been to support every honest transaction, the true nature of which is derivable from the instrument itself. If it appeared, for instance, that prior to the grant of the annuity there had been a grant of a former annuity by the same grantor to the same grantee, the securities for which were cancelled on the occasion of the secured advance, the Court was not very particular in insisting that the former transaction should appear (1). But the words of the *Bills of Sale Act* are imperative and very clear. The bill of sale "shall set forth the consideration for which such bill of sale was given." However duly the bill of sale may be registered, it will be void if the consideration be not truly stated therein.

A more honest transaction than this cannot be conceived. The £400 was lent by Mr. *Hird* at various times. Out of five advances the first three were made to the debtor and *Oldfield* as partners; that is to say, there was a joint and several liability on the part of the debtor and *Oldfield* to repay to *Hird*. Then *Oldfield* ceases to be a partner. But that does not diminish *Oldfield's* liability in the smallest degree. He assigns over his interest in the partnership in some informal way to the debtor, upon the terms that the debtor shall indemnify him against the debts of the firm, of which this sum of £240 was one, the rest of the £400 being advanced to *Hird* alone. Then on the 1st of January in this year this Act of Parliament regulating and extending the operation of the former *Bills of Sale Act* comes into operation, requiring for the first time that every bill of sale shall set forth the consideration for which it was given; and then in May this bill of sale is executed. What would have been more easy than for this grantor to have truly set forth the consideration? There was no particular reason why he should not do so. The money having been advanced by instalments to the persons and in the manner I have mentioned, what does the deed say? It recites as follows:—[His Lordship read the recital as set out above, and continued:—]

Anything more contrary to the truth than this recital there cannot be. Of the £400, the sum of £240 was not advanced in the month of June, nor was it advanced to the debtor alone.

It is not for me to question the policy of the Act of Parliament, nor to enter into a speculation of what may or might have been the consequences of this misrecital. The fact is that this £240 was an old debt to a firm which had ceased to exist, and it is represented as having been part of a present advance. I do not rely upon the possible consequences of the misstatement in the slightest degree. What I have to rely upon is, that this Act of Parliament expressly declares that under certain circumstances a

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(1) *Symmons* v. *Mortimer*, 5 T. R. 139.

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bill of sale shall be deemed void, and that this bill of sale does fall exactly within that state of circumstances. As Lord *Kenyon* observed in *Washburn* v. *Birch* (1), "The objection is, not that the consideration is not a good one, but that it is not truly stated." I dare not say that I can interfere with the operation of the statute, though the enactment is a novelty, and the transaction is no doubt a just and an honest one, and one that ought to be carried into effect. But on the ground that the consideration for which the deed was given is not truly stated in it, it is a void bill of sale, and so it must be declared to be.

The Appellant will take back his deposit, and I can give no costs to either side. It has been a slip, and but for this misrecital, which might easily have been avoided, it would have been a perfectly good bill of sale. Nor do I give any costs in the Court below.

Solicitors: *Van Sandau & Cumming*, agents for *Mills & Bibby, Huddersfield*; *Cowdell, Grundy, & Browne*, agents for *Barker & Yeoman, Huddersfield.*

In re PRATT. *Ex parte* GUSH.

C. J. B.
1879
May 19.

Composition—Registration of Resolutions—Costs of Creditor's Solicitor—Jurisdiction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 72—*Bankruptcy Rules*, 1870, *r.* 275.

Where creditors agree to accept a composition, and employ a solicitor to register the resolutions without making any special provisions therein for payment of the solicitor's costs, the Court has no jurisdiction to enforce payment of these costs by the debtor.

THIS was an appeal from the County Court at *Norwich.*

On the 9th of November, 1877, *William Pratt*, the debtor, a boot and shoe maker, filed a petition for liquidation.

On the 6th of December the first meeting of creditors was held, when it was resolved to accept a composition of 10*s.* in the pound, and that the registration of the resolution and the debtor's statement of affairs should be entrusted to Messrs. *Walters & Gush*, the creditor's solicitors. The resolution, however, contained no

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(1) 5 T. R. 472.

C. J. B.
1879
In re Pratt. *Ex parte* Gush.

provision as to the person by whom the costs of the proceedings and of registration were to be paid.

On the 20th of December a second meeting was held, when the resolutions passed at the first meeting were confirmed, and the resolutions were afterwards duly registered by Messrs. *Walters & Gush.*

The firm of *Walters & Gush* was, by a change in the partnership, subsequently represented by the Appellants, Messrs. *Gush & Phillips,* who applied to the debtor for the payment of their bill of costs, amounting to £37 16*s.* 2*d.*, and as the debtor declined to pay, application was then made to the County Court to have this bill taxed and paid by the debtor.

On the 21st of April, 1878, this application was dismissed, with costs, on the ground that there was no retainer or relationship of solicitor and client between Messrs. *Gush & Phillips* and the debtor, and that the resolutions contained no provision for payment of these costs.

Messrs. *Gush & Phillips* appealed.

Sidney Woolf, for the Appellants:—

In a case like this the debtor is the proper person to pay these costs; he has accepted the benefit of these proceedings and ought to bear the costs of them. It could not be supposed that the creditors were to pay them out of their dividends. The Court has jurisdiction to settle the amount of a solicitor's charges as a matter incident to the composition: *In re Lyons, Ex parte Lyons* (1); and to order taxation of costs in a composition: *In re Dixon, Ex parte Shepherd* (2); and therefore, by inference, to order payment of these costs when settled or taxed. The jurisdiction given by sect. 72 of the *Bankruptcy Act,* 1869, is very wide.

Cozens-Hardy, for the Respondent, was not called upon.

Bacon, C.J.:—

How can I make the order now applied for: and what jurisdiction have I to order the debtor to pay these costs? The creditors meet and duly pass certain resolutions, and appoint a firm of solicitors. The matter is in the hands of the creditors alone; they agreed to accept a composition, and if they at the same time omitted to insert a stipulation as to payment of these costs by the debtor that is their affair. I have no jurisdiction to make the debtor pay these costs, and I must therefore dismiss this appeal; but I make no order as to costs.

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(1) Law Rep. 7 Ch. 495.

(2) 2 Ch. D. 430.

Solicitors: *Gush & Phillips; Johnson & Master*, agents for *J. B. Coaks & Co., Norwich.*

Ex parte MANCHESTER BANK. *In re* MELLOR.

C. J. B.
1879
May 26;
June 16.

Bankruptcy—Partnership—Joint and Separate Estate.

A father and son were in partnership under articles, which provided that the machinery and stock-in-trade should belong to the father, and not form part of the capital of the partnership. The father died, having by will empowered but not directed his executors to continue his business. Two of the executors, namely, the son and the testator's widow, continued the business (the third executor being cognizant but not acting). At the testator's death the old firm were indebted to a bank, who in their books wrote off the old debt ~~and debited the new firm with the amount~~. The new firm went into liquidation. At this date there were assets in possession of the new firm in specie, such as machinery, which had been employed by the old firm:—

Held, that the proceeds of sale of the machinery were assets of the old firm, liable to the debt of the bank in priority to creditors of the new firm:

Held, further, that the machinery did not pass as in the reputed ownership of the new firm.

Affirmed on appl 13 Ch D 465. CA

THIS was an appeal from the County Court at *Manchester.*

In 1871 *Joseph Hague Mellor*, cotton-spinner, of *Oldham, Lancashire*, took his son *Joseph Wainwright Mellor* into partnership with him; and by an agreement, dated the 19th of October, 1871, and expressed to be made between the two partners "for the purpose of declaring their rights and interests in the said partnership," it was agreed as follows:—

"1. That they should continue partners until determination of the partnership by six months' notice to be given by either of them.

"2. That the machinery, stock-in-trade, book debts, and capital now belonging to and used by the said *Joseph Hague Mellor* in his trade of a cotton-spinner and doubler, belongs to the said *Joseph Hague Mellor*, and does not form part of the capital of the said partnership, and that the said *Joseph Hague Mellor* shall receive and be paid interest on the said capital so belonging to him as aforesaid after the rate of £5 per cent. per annum.

"3. That the capital of the partnership shall consist of such further sum as either or both of the said partners may either advance or acquire by accumulation of profits.

"4. All rents and expenses incident to the partnership business, and all interest on capital and all losses incurred in carrying on the same business, shall be paid out of the profits thereof, and the deficiency (if any) shall be borne by the partners in the following shares, namely, by the said *Joseph Hague Mellor* five-sixths, and by the said *Joseph Wainwright Mellor* one-sixth of such loss.

"5. That the profits of the partnership shall after payment of all rents, interest, and trade expenses, be divided between the said partners in the following shares, namely: five-sixths to the said *Joseph Hague Mellor*, and one-sixth to the said *Joseph Wainwright Mellor*, and neither of the partners shall be entitled to draw out of the partnership business more than his share in the profits."

It was further provided that annual accounts should be taken and made out; and provisions were inserted in the event of the bankruptcy of either partner.

Under this agreement the partnership was carried on under the name or firm of "*J. H. Mellor & Son*" until the death of *Joseph Hague Mellor*, the father, which took place on the 20th of November, 1876.

By his will, dated the 19th of January, 1875, *Joseph Hague Mellor*, after certain specific bequests, devised all his real estate to his wife *Hannah Mellor*, his son *Joseph Wainwright Mellor*, and his son-in-law *Henry Buckley*, their heirs, executors, and administrators respectively, upon trust to sell, and bequeathed his personal estate to the same three persons upon trust to sell and convert, and out of the proceeds of the sales and conversion to pay his funeral and testamentary expenses, and debts, and to invest the residue in specified classes of securities, and hold the trust fund upon trust to pay an annuity of £300 to his wife for life, and to raise a sum of £2000, and two sums of £3000, for the benefit of his three daughters respectively. Testator then directed his trustees to stand possessed of the trust fund, upon trust to pay the income to his wife and his son, *J. W. Mellor*, until his second son, *J. H. Mellor*, should attain twenty-three, and thereafter until his third son, *G. E. Mellor*, should attain twenty-three, and thereafter for the benefit of the said two younger sons respectively. The will contained provisions for the advancement of any child, and for maintenance and education; and gave power to the trustees or trustee to defer the sale and conversion of any part of the real and personal estate "at their or his absolute discretion." Testator then proceeded as follows:—

"And I hereby declare that my trustees or trustee may at their or his discretion either carry on any trade or business which I have bound my executors to continue for the full period agreed upon, or any less period, or may discontinue such trade or business, with the consent of the partner or partners engaged therein (if any); and I direct my said trustees or trustee if and when any such business shall be discontinued, to wind up or dispose of the same upon such terms as are provided in the articles of partnership or agreement between me and my partners (if any), or upon such terms as my executors or executor and the partner or partners therein shall agree upon. And I direct my trustees or trustee, at their, his, or her discretion, either to wind up or dispose of, or to continue either alone or in conjunction with any person or persons, any business in which I may be engaged at my death, and which I may not have bound my executors to continue; and I hereby declare that it shall be lawful for my said trustees or trustee, at their, his, or her discretion, to employ the capital employed in any business which they may continue to carry on, in carrying on such business, and to employ in such business any money, part of my general estate; all such capital and money so employed to bear interest at the rate of £5 per cent. per annum, payable half yearly. I hereby declare that it shall be lawful for the said trustees or trustee to employ such persons in winding up, disposing of, or carrying on any business, at such wages or salaries as they or he shall think fit: Provided always and I hereby further declare that, any bequest or thing whatsoever hereinbefore contained or implied to the contrary in any way notwithstanding, it shall be lawful for the said trustees or trustee to retain or employ all or any or any part of all or any of the legacies or legacy, bequests or bequest, hereinbefore given or bequeathed, in carrying on or assisting in my said business, so long as they, he, or she, in their, his, or her discretion shall elect to carry on the said business under the powers or provisions hereinbefore contained; they, he, or she paying nevertheless interest after the rate of £5 per cent. per annum to the persons or person respectively entitled to the corpus of the legacies or legacy, or such part thereof as shall for the time being be so retained or employed by the said trustees or trustee for the purposes aforesaid."

The testator appointed his widow and son, and *Henry Buckley*, his executors, and they all proved the will.

For some years before the testator's death the partnership firm had been keeping an account with the *Manchester and County Bank* at *Oldham*, and at the testator's death there was a sum of £3947 13*s.* 8*d.* due to the bank on this overdrawn account.

Shortly after the testator's death Mr. *J. Wainwright Mellor* agreed verbally with his mother, Mrs. *Hannah Mellor*, to carry on the business as before, subject to the provisions of the will; and Mr. *Mellor*, in answer to a letter from the manager of the bank, informed the manager of the above arrangement, and of the purport of the will, and wrote to him a letter in the following terms:—

"Memorandum, December 14th, 1875.

"Messrs. *J. H. Mellor & Son, King Street Mills, Oldham*, to
T. Charlesworth, Esq., *Manchester and County Bank.*

"Dear Sir,—Owing to the death of Mr. *J. H. Mellor*, Mrs. *Mellor* is now a partner in our firm, and will sign as the enclosed.

"(Signed) *Joseph W. Mellor*,
"Surviving partner of *Joseph Hague Mellor & Son.*"

In consequence of the above statement the bank closed their account with the former firm of *J. H. Mellor & Son*, and opened an account with the new firm, ~~in which they debited the new firm with the former balance~~.

See S C
13 Ch D 466

In December, 1875, a balance-sheet was drawn up dated the 31st of that month, purporting to be a statement of the affairs of

"Messrs. *J. H. Mellor & Son*" at that date. In this account, on the debtor side, was entered an item of "principal machinery" £16,312 5*s.* 8*d.*, and on the creditor side were entered items of "*M. & C. Bank*, £3947 13*s.* 8*d.*," and of "Capital £15,034 3*s.* 6*d.*" It was deposed that this statement practically represented the state of affairs of the firm of *J. H. Mellor & Son* at the death of *J. H. Mellor.*

The debt of the former firm of *J. H. Mellor & Son* to the bank was afterwards reduced by the proceeds of a policy of assurance on Mr. *J. H. Mellor's* life, held by the bank, to a sum of £2729, or thereabouts.

In June, 1876, the bank advanced £1000 to the second firm, on having a guarantee.

In April, 1877, Mr. *Buckley*, who had taken no part in the business of the partnership, nor in directing or advising its continuance, though aware of the fact of its having been continued, retired from the trusteeship of the will; and by a deed dated the 28th of April, 1877, another trustee was appointed.

In November, 1877, the firm of *J. H. Mellor & Son* presented a liquidation petition. At this date the firm was indebted to the bank, and their debts to general creditors amounted to about £7000. The only debt of the former firm remaining unpaid was the before-mentioned sum of £2729, due to the bank.

At a statutory meeting of creditors, held on the 23rd of November, 1877, a claim was put forward by the bank to have the proceeds of sale of the machinery in the mill, and other items of stock-in-trade, stores, and book debts, which could be proved to have been used as capital by the former firm, applied to the payment of the debt to the bank of the former firm. This was resisted by the creditors of the new firm, who claimed to have all the assets distributed in the liquidation. In the result resolutions for liquidation by arrangement were passed and two trustees were appointed —one a Mr. *William Butcher*, representing the general creditors— and the other a Mr. *Wrigley*, nominated by the bank.

The machinery having been sold, and the proceeds having been paid into the bank in the names of the trustees, an order was, on the 4th of February, 1879, made by the County Court that an issue in which *William Butcher* as trustee should be Plaintiff, and the bank should be Defendants, should be tried in the Court, to decide whether the trustee or the bank were entitled to the money.

On the 6th of March the issue was tried, and the verdict of the Court was that the proceeds of sale belonged to the Plaintiff, the liquidation trustee.

From this order the Defendants, the bank, now appealed.

Herschell, Q.C., and *Smyly*, for the Appellants, the banking company:—

The terms of the will contemplated a possible direction by the testator to his executors to carry on his business; but the will contains no such direction. The testator only authorizes, he does not direct, his executors to carry on his business; and he empowers them to employ in such business the capital already employed therein, and also any money, part of his general estate; and directs that all such capital and money shall bear interest at five per cent.

In this state of things there are two authorities applicable, and the question is, under which of the two does the case fall? One is *Ex parte Morley* (1), the other *In re Simpson* (2). Our contention is that the facts are within *Ex parte Morley*. By the elder Mr. *Mellor's* death the partnership was dissolved; and his executors and the surviving partner together became liable for the debts of the firm. At law the executors might sue the surviving partner; in equity they might get an administration decree. Nothing has occurred to alter that right. The specific property of the old firm must be applied to the specific debts of the old firm. Upon the construction of the will, it must be held that the business carried on by Mr. *Mellor* the younger and Mrs. *Mellor* was entirely a new business. They were executors; but nevertheless they were carrying on a new business; and the assets of the new business will go to the satisfaction of the new debts. As the will stands, it was entirely discretionary with the executors whether they would continue the business or not. Until they made that determination, nothing was done. When they made the determination, then, no doubt, arose their authority to use the capital of the old firm. But that would not displace the rights of creditors of the old firm: *Ex parte Dear* (1).

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(1) Law Rep. 8 Ch. 1026.

(2) Law Rep. 9 Ch. 572.

BACON, C.J.:—Do you contend that the creditors had a lien on these assets?

Herschell:—Not that they had a lien, but that they might have instituted a creditor's suit. Continuation of the business, with the authorized use of the assets for the purposes of the new firm, cannot affect the question of how, in the event of bankruptcy, the old assets are to be administered: *Hankey* v. *Hammond* or *Hammock* (2). The only difference (which is immaterial) between that case and this is, that there the testator had directed his whole estate to be used in the business which was to be continued by the executor.

BACON, C.J.:—Suppose the testator had said, I direct £10,000 to be used in carrying on the continued business, could the creditors of the old firm have claimed that?

Herschell:—Perhaps not, unless the sum were ear-marked; but here we find specific chattels which can be identified as having been employed in the business of the old firm.

A second point that has been raised is, that these chattels were in the order and disposition of the debtors with the consent of the true owners at the date of the liquidation; but it is difficult to see how it can arise.

Ambrose, Q.C., and *Finlay Knight*, for the trustee:—

When the balance-sheet of December, 1875, was made out, the new firm had not commenced business.

Smyly:—We dispute that.

Ambrose:—At any rate that balance-sheet was a statement of the affairs of the old firm, and in that statement this machinery was taken into account.

Upon the death of *J. Hague Mellor*, *J. Wainwright Mellor*, as surviving partner, had a right to have the concern wound up, he being liable to be sued by the creditors of the late firm. The creditors of the late firm also had a right to insist that every sixpence of the assets of the late firm should be applied in payment of their debts; but they had no lien on the assets of the late firm. Failing the assets of the firm, they had a right to sue the executors for their unpaid balance. But there was nothing to prevent the executors, acting *bonâ fide*, from selling the deceased partner's share to the surviving partner, in order to prevent the estate from being broken up, and any such agreement, if not fraudulent or improvident, would be binding on the creditors.

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(1) 1 Ch. D. 514. (2) Buck, 210, 216; 3 Madd. 148, n.; 1 Cooke, B. L. 67.

What happened was this. The executors did not carry on the business; but a new firm was constituted—that is to say, the deceased partner's share was conveyed by the executors to the new firm, and the bank not only had notice of the constitution of this new firm, but they acquiesced in it, by writing off the old debt and debiting the new firm with the balance. The consideration for the purchase was, that the new firm should discharge the debts of the old partnership.

In *Ex parte Morley* (1) there were three sets of creditors and three classes of assets; and the junior partner in the firm continued the business as executor. The applying creditors were separate creditors of the deceased partner, and the decision was that the separate creditors of *White*, senr., deceased, had no claim on the joint assets; that the deed did not convert the joint assets into assets available for the separate creditors of *White*, senr. Here the question is between the old and the new creditors. The bank have the security of the new firm in lieu of their right to proceed against the old.

The effect of the arrangement in this case is similar to the effect of the deed in *Ex parte Simpson* (2), and must depend on the principle there stated.

Ex parte Dear (3) was merely a following out of *Ex parte Morley*.

In *Ex parte Garland* (4) there are several propositions which support our view.

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(1) Law Rep. 8 Ch. 1026.
(2) Ibid. 9 Ch. 572.
(3) 1 Ch. D. 514.
(4) 10 Ves. 110.

Upon the authority of *Kitchen* v. *Ibbetson* (1), if the Court holds that these chattels belonged to the bank as creditors, it then must further hold that the bank consented to their remaining in the order and disposition of the debtors at the date of the liquidation.

The bank have acquiesced throughout; they have accepted a new debtor in lieu of the old; and they have allowed new rights and claims to spring up, they standing by the whole time, and making no sign.

The principles of *Ex parte Butterfield* (2) and *Owen* v. *Delamere* (3) also apply.

BACON, C.J.:—

This is a case in which I do not think I ought to call for a reply.

The question is purely one of administration in bankruptcy. Mr. *Mellor* and his son carried on business together Mr. *Mellor* being the capitalist, and the owner, if not of all, certainly of the larger part of the joint property. Mr. *Mellor* died. What was the state of things then? Mr. *Mellor* could not by his will, nor by any act that he had done in his lifetime, withdraw from the partnership any part of that joint estate until the joint debts of the partnership were paid. The right of a partner to withdraw from the partnership is always subject to the equitable right which the co-partner has to see that all the debts are paid.

In administrations in bankruptcy it must always be borne in mind what are the equitable rights of the partners *inter se*, because the decision of that question governs all that can flow from the transaction. That is the principle of that case so often quoted, and I am sorry to say, not always, according to my notion, understood, of *Ex parte Waring* (4). In the argument, Lord *Eldon*, having hesitated very much about it, said that it presented considerable difficulties. Speaking from recollection of that case, I believe Lord *Eldon* said, that the right principle to be applied was that used by Mr. *Cooke* in argument, and that that was the only way of settling the equities between the partners. They were

(1) Law Rep. 17 Eq. 46.

(2) De G. 319.

(3) Law Rep. 15 Eq. 134.

(4) 19 Ves. 345; 2 Rose, 182; 2 Glyn & J. 404.

not partners there, but they were co-adventurers in a particular transaction.

The question before me is simply one of administration in bankruptcy, as I have said. At the date of Mr. *Mellor's* death a large amount of joint debts was due, and they are all paid, it seems, but one. Upon Mr. *Mellor's* death, there being a certain authority contained in his will to his executors to carry on his trade with a partner if they thought fit, in some sort of helter-skelter way, without articles of partnership and without any agreement from which I can draw any just conclusion, the widow and son carried on the business and have become bankrupt. It is said that the partners in the new firm, acting upon some authority in the will, made out a balance-sheet. If so, they made it out for their own purposes only. They put a certain assumed value upon the joint assets, and on the opposite column they placed what they believed to be the joint debts. I have not to examine that; it is a matter of no kind of importance, which affects nobody, and certainly does not affect the case. They carried on their business in this way. The surviving partner, who had the right to have every shilling of the joint estate applied in payment of the joint debts, writes to the bank, saying, "We have begun a new partnership; my mother and I are carrying on the business; you will accept her signature to the cheques she draws upon you." So it goes on, and the bank remains a joint creditor of the old firm down to the present time, when the new firm becomes bankrupt; and I have in bankruptcy to administer the assets which are found in the possession of that new firm. These assets are joint estate remaining *in specie;* it is not a question of money as in *Ex parte Richardson* (1), and the other cases in which sums of money were taken from the testator's estate. Can there be any doubt that the persons who answer the description of joint creditors are the persons who are first entitled to this estate? I can see no answer to that, except what has been attempted to be argued, that this property was in the order and disposition of the new partners. But it has never been in any order and disposition, except that which it was always in; and at the date of the death of the elder *Mellor* it was in the sole order and disposition of the son, the present bankrupt. Since then the order and disposition have never undergone any change. There has not been any exercise of ownership or authority by him, there has been no contract between him and his mother as partners, and no change whatever.

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(1) Buck, 202, 209.

Now the cases which have been referred to really strike me as having very little application to this case, if they have any at all. *Ex parte Richardson* (1) was referred to, and part of the judgment was read by Mr. *Ambrose*, where reference is made to the previous authorities of *Ex parte Garland* (2) and *Hankey* v. *Hammock* (3). It may be worth while to see how the case was presented by the Judge in *Ex parte Richardson* (4). His Lordship read the judgment of the Vice-Chancellor (Sir *John Leach*), and upon the passage, "If the executor does not go beyond his authority, then the assets employed by him in the trade can never be proved under the commission—they are part of the capital of the trade to pay its debts"—observed—That is precisely what is the case here. The joint estate is part of the capital of the business to pay its debts, and never was part of that estate which could pass by the will until the joint debts were paid. The judgment continues:—"But, on the other hand, if in breach of his trust he makes use of the assets in the trade to an extent not authorized by the will, the excess so employed may be proved as a debt under the commission. It is the same thing as if the executor had employed the assets of another estate in the trade. . . . In *Ex parte Garland* the executrix had not only made use of the fund entrusted to her management, but also a further sum of £768 12*s*. 4*d*. In the result of that petition, the Lord Chancellor allowed a proof to that amount." Supposing a testator dies having a sum in Three per Cent. Consols, and the executors draw that out and lend it to the continuing partnership, it would be as plain a debt as if there had been no original partnership existing. Then the Vice-Chancellor refers to *Hankey* v. *Hammock*. He says, "Lord *Kenyon* was of opinion that the testator authorized the employment of the whole estate in the trade. Upon looking into this will I cannot find any authority given to the executor to add to the capital employed in the trade at the time of the testator's death from his

(1) Buck, 202, 209.
(2) 10 Ves. 110.
(3) Buck, 210, 216.
(4) Ibid. 209.

other effects." Then he goes on to refer to the partnership articles. "By the partnership articles the profits were to accumulate till the shares amounted to £10,000; but there was no stipulation that the partners should bring in money to make up that sum, and the executors were not empowered to employ the assets for that purpose. Upon the whole I am of opinion that it was the intention of the testator that his executors should not employ in the trade any part of his personal estate which they did not find so employed at the time of his death, and that the executrix by acting in a contrary manner has been guilty of a breach of trust."

The case of *Hankey* v. *Hammock* (1) has been referred to, but I do not think it necessary to say anything about that case.

Ex parte Morley (2) was referred to. In that case the point now in discussion was decided. The elder *Morley* died, and the joint estate became vested in the elder *Morley's* executors. The son carried on the business, no matter under what authority, and became bankrupt. The decision of the Court in *Ex parte Morley* is, that that part of the assets belonging to the joint estate in the lifetime of the father was distributable among the joint creditors of the firm in which the father was a partner. I am not at liberty, if I had the inclination, which certainly I have not, to go against a plain and distinct authority and recent decision of the Court of Appeal. The point was very fully considered in the judgment of Lord Justice *James* and Lord Justice *Mellish*, and nothing I have heard tends to impeach that opinion. *In re Simpson* (3) is a case of a totally different character. There it was provided that if a partner died, all his interest in the partnership was to vest in the continuing partners, and that that which was his and their joint estate should thenceforth be joint estate of the survivors. That is authorized by other cases to which I will not trouble to refer.

The Court of Bankruptcy is a Court of Equity, and it has always been so from the earliest bankruptcy statute that was passed down to the latest. The administration of the Court has always been equitable. The execution of the Act was entrusted to and remained for a great many years in the hands of the head

(1) Buck, 210, 216.

(2) Law Rep. 8 Ch. 1026.

(3) Law Rep. 9 Ch. 572.

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of the Court of Chancery, and all the decisions which can be referred to proceeded upon equitable principles, except those few cases which are to be found at common law, where common law authorities alone prevailed. Wherever any question of the equities between partners arises, the Court refers to the principles which govern the administration of property in the Court of Chancery, and they only are applicable to the administration of bankruptcy. In this case it is not a matter of dispute that all the joint debts existing at the date of the death of the elder *Mellor* are paid, except that of the bankers, and it is also admitted that there are certain specific assets which were the property of the joint estate at the date of the elder *Mellor's* death. Supposing the assets are distributable among the joint creditors, if there were more than one, there being but one, they are payable to the bankers, who are the only remaining joint creditors of the old firm of *Mellor & Son.*

The appeal must be allowed with costs.

Solicitors: *Sale, Seddon, Hilton, & Lord, Manchester; Yeilding*, agent for *Cobbett, Wheeler, & Cobbett, Manchester.*

END OF VOL. XII.

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ANNUITY—*continued.*

A. to repurchase the annuity at any time after three years on payment to *C.* of £600 and all arrears of the annuity. On the day before the date of the deed by which the annuity was granted, *C.* insured *B.'s* life for £600, at an annual premium of £16 7*s.* 6*d.*—The copyholds were surrendered, and *C.*, by himself or his representatives since his death, had been in possession since 1828.—*A.* died in 1858, and *B.* in 1869:—*Held*, as between the representatives of *C.* and *B.*, that the surplus proceeds of the policy effected by *C.* on *B.'s* life, after satisfaction of the £600 and all arrears of the annuity, belonged to the representatives of *C.* and not of *B.*—*Gottlieb* v. *Cranch* (4 D. M. & G. 440) and *Knox* v. *Turner* (Law Rep. 5 Ch. 515) followed.—*Lea* v. *Hinton* (5 D. M. & G. 823), *Drysdale* v. *Piggott* (8 D. M. & G. 546), *Courtenay* v. *Wright* (2 Giff. 337), discussed. PRESTON *v.* NEELE - - 760

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2. —— *Fraudulent Preference*—*Assignment of Whole Property, Present and Future, in Consideration of Past Debt and Future Advances*—*License to seize*—*Statute* 13 *Eliz. c.* 5—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6.] A bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage to secure an existing debt and future advances, is not necessarily void under the statute 13 Eliz. c. 5.—It will only be void if it is not made *bonâ fide*, *i.e.*, if it is a mere cloak for retaining a benefit to the grantor.—Nor, if the time be past within which the execution of the deed is an act of bankruptcy available for adjudication against the grantor, or within which the deed can be set aside as a fraudulent preference, can it be treated as void under the bankruptcy law.—Decision of *Bacon*, C.J., reversed. *Ex parte* GAMES. *In re* BAMFORD [C. A. 314

3. —— *Married Woman*—*Liability to Bankrupt Law*—*Separate Estate*—*Debt contracted after Marriage*—*Debtor's Summons*—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7, 8—*Married*

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Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *ss.* 1, 12—*Rules of Court*, 1875, *Order* XVI., *r.* 8.] A married woman is not liable to the bankrupt law, even though she has separate estate and has contracted engagements after her marriage.—The *Married Women's Property Act*, 1870, has made no difference in this respect. *Ex parte* JONES. *In re* GRISSELL - - - - - **C. A. 484**

4. —— *Partnership—Joint and Separate Estate.*] A father and son were in partnership under articles, which provided that the machinery and stock-in-trade should belong to the father, and not form part of the capital of the partnership. The father died, having by will empowered but not directed his executors to continue his business. Two of the executors, namely, the son and the testator's widow, continued the business (the third executor being cognizant but not acting). At the testator's death the old firm were indebted to a bank, who in their books wrote off the old debt and debited the new firm with the amount. The new firm went into liquidation. At this date there were assets in possession of the new firm in specie, such as machinery, which had been employed by the old firm:—*Held*, that the proceeds of sale of the machinery were assets of the old firm, liable to the debt of the bank in priority to creditors of the new firm:—*Held*, further, that the machinery did not pass as in the reputed ownership of the new firm. *Ex parte* MANCHESTER BANK. *In re* MELLOR - - - **917**

5. —— *Petition—Improper Motive—Collateral Object—Abuse of Process of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 8.] When the Court sees that a bankruptcy petition is presented, not with the *bonâ fide* view of obtaining an adjudication, but for a collateral purpose and with the view of putting pressure on the debtor, it will refuse to make an adjudication, even though there be a good petitioning creditor's debt, and an act of bankruptcy has been committed. *Ex parte* GRIFFIN. *In re* ADAMS - - - **C. A. 480**

6. —— *Proof—Joint and Separate Estate—Joint and Several Liability of Partners—Guarantee—Construction.*] A firm of *S. & Co.* consisted of three partners, *F.*, *R.*, and *N.*, and carried on business in *London*. Another firm of *N. & Co.* consisted of five partners, *F.*, *R.*, *N.*, *H.*, and *M.*, and carried on business in *India*. In September, 1872, *N. & Co.* applied by letter to a bank for a credit, agreeing to deliver to the bank as security "the personal obligation of this firm and individual partners, and a guarantee by *S. & Co.*" The bank granted the credit, and under it *N. & Co.* received large advances. In February, 1874, a letter was addressed to the bank, signed by *S. & Co.* and also by *F.*, *R.*, and *N.*, saying, "We hereby guarantee you payment of all sums which are or may at any time become due to you by *N. & Co.* under the credit applied for in September, 1872, and granted by you." This letter and the signature of *S. & Co.* to it were written by *F.*, and he had negotiated the original transaction with the bank. *S. & Co.* filed a liquidation petition, and *N. & Co.* stopped payment, a large sum being due to the bank under the credit:—*Held*, that the letter of February, 1874, pledged to the bank the joint liability of the firm of *S. & Co.*, and also the separate liability of each of the three partners who signed it, and that the bank were entitled to prove against the separate estate of *F.* for the amount due to them by *N. & Co.* under the credit. *Ex parte* HARDING. *In re* SMITH, FLEMING, & Co. - **C. A. 557**

7. —— *Proof—Mutual Credits—Equitable Set-off—Accounts with Bankers in Joint Names of Executors and of one Executor who is also Residuary Legatee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 39.] An executorship account was kept with bankers in the joint names of the two executors, who were brother and sister. The brother, who was the residuary legatee under the will, kept another account of his own with the bankers. The bankers filed a liquidation petition, and at that time there was a balance standing to the credit of the joint account, but the other account was overdrawn. Securities had been set apart to answer the legacies bequeathed by the will, and the testator's debts and funeral and testamentary expenses had been paid. But the executors were jointly liable for some rates and taxes and a solicitor's bill of costs which had not been paid:—*Held*, that the one account could not be set off against the other in the liquidation of the bankers.—The rules of equitable set-off or mutual credit could not apply unless the brother was so much the person solely beneficially interested in the balance of the joint account that a Court of Equity, without any terms or any further inquiry, would have compelled the sister to transfer the account into the brother's name alone.—*Bailey* v. *Finch* (Law Rep. 7 Q. B. 34) and *Bailey* v. *Johnson* (Law Rep. 6 Ex. 279; Ibid. 7 Ex. 263) explained. *Ex parte* MORIER. *In re* WILLIS, PERCIVAL, & Co. [**C. A. 491**

8. —— *Proof—Secured Creditor—Valuation of Security—Bills of Exchange held by Banker "pending discount"—Amendment of Proof—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16, 40—*Bankruptcy Rules*, 1870, *rr.* 99, 100.] Bills of exchange indorsed by a customer to his banker in order that they may be discounted, and held by the banker "pending discount," *i.e.*, pending inquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, are not securities, which the banker, in proving in the customer's bankruptcy for the amount due to him by the customer, is bound to value. The banker is entitled to prove for the full amount due to him, and also to recover what he can from the other parties to the bills, provided that he does not receive in the whole more than 20*s.* in the pound.—In the case of an evident mistake, an amendment of a proof will be allowed after the creditor has voted in the choice of a trustee. *Ex parte* SCHOFIELD. *In re* FIRTH - - **C. A. 337**

9. —— *Resolution for Composition—Registration—Costs of Creditor's Solicitor—Jurisdiction—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72—*Bankruptcy Rules*, 1870, *r.* 275.] Where creditors agree to accept a composition, and employ a solicitor to register the resolutions without making any special provisions therein for payment of the solicitor's costs, the Court has no jurisdiction to enforce payment of these costs by the debtor. *In re* PRATT. *Ex parte* GUSH - - **915**

BANKRUPTCY—*continued.*

10. —— *Undischarged Bankrupt—Second Adjudication of Bankruptcy—Validity.*] An adjudication of bankruptcy against a debtor who has not obtained his discharge under a previous adjudication and has been allowed by the trustee to resume business is not void. *Morgan* v. *Knight* (15 C. B. (N.S.) 669) followed. *Ex parte Sydney* (Law Rep. 10 Ch. 208) distinguished. *Ex parte* Watson. *In re* Roberts - - - - **C. A. 380**

11. —— *Practice—Appeal—Extension of Time—Adjudication of Bankruptcy—"Person aggrieved"—Rules of Court,* 1875, *Order* LVIII., *rr.* 9, 15—*Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 10, 71.] A third person who is aggrieved by an adjudication of bankruptcy, by reason of the date of an act of bankruptcy on which the adjudication purports to be founded, is, after the expiration of the time limited for appealing, entitled, *ex debito justitiæ,* to an extension of the time for appealing, if he applies promptly after he becomes aware of the date of the act of bankruptcy which affects his rights. *Ex parte* Tucker. *In re* Tucker - - - - **C. A. 308**

12. —— *Practice—Appeal—Person aggrieved—Limit of Time for appealing—Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Bankruptcy Rules,* 1870, *r.* 143.] The limit of time for bringing an appeal fixed by rule 143 of the Bankruptcy Rules, 1870, applies equally to all "persons aggrieved," whether parties to the order or not. An order of adjudication, duly made, and not appealed against for twenty-one days, is good against all the world. *In re* Johnson. *Ex parte* Wigg [905

—— Bankrupt trustee—Removal of - 634
See Trustee.

—— Jurisdiction - - - - 522
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—— Life interest determinable on - - 872
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—— Proof—Loan to trader - - - 366
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—— Shareholder in company—Disclaimer by trustee - - - - 288
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BANKRUPTCY RULES, 1870, rr. 99, 100 - 337
See Bankruptcy. 8.

BILL OF EXCHANGE—Held by banker "pending discount" - - - 337
See Bankruptcy. 8.

BILLS OF SALE ACT—*Registration—Setting forth of Consideration—Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10, *sub-s.* 2.] A bill of sale, dated the 10th of January, 1879, recited that in the month of June preceding the mortgagor applied to the mortgagee for a loan of £340, which the mortgagee consented to make on the mortgagor agreeing to execute a bill of sale, when called upon to do so, of certain chattels; and that in the month of July following the mortgagor applied for a further loan of £60, which the mortgagee agreed to make, on the condition that the advance should be secured in like manner.—The facts were, that a sum of £73 on the 3rd of March, 1878, another sum of £60 on the 6th or 7th of April, 1878, and a third sum of £107 on the 26th or 27th of April, 1878, were severally advanced by the mortgagee to a partnership firm, consisting of the mortgagor and another person. On the 8th of June, 1878, the partnership was dissolved, the mortgagor taking over the assets, and undertaking in an informal way to indemnify his late co-partner against the debts of the partnership, of which the above £240 remained one. On the 14th of June, 1878, the mortgagee advanced £100, and on the 16th of July he advanced the remaining £60 to the mortgagor alone:—*Held,* that the consideration for which the bill of sale was given was not "set forth" therein sufficiently to satisfy the requirement of the *Bills of Sale Act,* 1878; and that the bill of sale was void. *Ex parte* Carter. *In re* Threappleton - - - - 908

BLENDED FUND—Residue—Realty and personalty - - - - 162
See Will. 9.

BONUS—Apportionment Act - - 655
See Apportionment.

CANAL—Towing-path - - - 383
See Towing-path.

CAPITAL—Reduction of - - - 254
See Company. 5.

—— Return of—Company - - - 503
See Company. 3.

CASES—*Attorney-General* v. *Ely, Haddenham, &c., Railway Company* (Law Rep. 4 Ch. 194) distinguished - - - 274
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—— *Bailey* v. *Finch* (Law Rep. 7 Q. B. 34) explained - - - - 491
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—— *Bailey* v. *Johnson* (Law Rep. 6 Ex. 279; 7 Ex. 263) explained - - 491
See Bankruptcy. 7.

—— *Brown, Ex parte* (Law Rep. 9 Ch. 304), followed - - - - 298
See Company. 6.

—— *Brown* v. *Brown* (3 P. & D. 202) considered
See Husband and Wife. 1. [605

—— *Castle* v. *Gillett* (Law Rep. 16 Eq. 530) not followed - - - - 162
See Will. 10.

—— *Coal Consumers Association, In re* (4 Ch. D. 625), followed - - - 181
See Company. 15.

—— *Corbyn* v. *French* (4 Ves. 418) followed 211
See Charity.

—— *Courtenay* v. *Wright* (2 Giff. 337) considered
See Annuity. [760

—— *Crédit Foncier of England, In re* (Law Rep. 11 Eq. 356) not followed - - 298
See Company. 5.

—— *Dickson* v. *Harrison* (9 Ch. D. 243) followed - - - - 298
See Company. 6.

—— *Drysdale* v. *Piggott* (8 D. M. & G. 546) considered - - - - 760
See Annuity.

—— *Evans* v. *Davies* (7 Beav. 81) followed 795
See Sheriff.

CASES—*continued.*

—— *Foligno* v. *Martin* (16 Beav. 586) not followed - - - - 666
See VENDOR AND PURCHASER. 3.

—— *Fothergill's Case* (Law Rep. 8 Ch. 270) followed - - - - 511
See COMPANY. 12.

—— *Goodright* v. *Moss* (2 Cowp. 591) followed
See EVIDENCE. 1. [845

—— *Gottlieb* v. *Cranch* (4 D. M. & G. 440) followed - - - - 760
See ANNUITY.

—— *Greville* v. *Browne* (7 H. L. C. 689) followed - - - - 162
See WILL. 10.

—— *Hilton* v. *Jones* (9 Ch. D. 620) overruled 68
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—— *Jay, Ex parte* (Law Rep. 9 Ch. 133), explained - - - - 26
See BANKRUPTCY. 1.

—— *Job* v. *Job* (6 Ch. D. 562) considered 534
See PRACTICE. 1.

—— *Knox* v. *Turner* (Law Rep. 5 Ch. 515) followed - - - - 760
See ANNUITY.

—— *Krehl* v. *Burrell* (10 Ch. D. 470) distinguished - - - - 553
See PRACTICE. 4.

—— *Lea* v. *Hinton* (5 D. M. & G. 823) considered - - - - 760
See ANNUITY.

—— *Martin* v. *Martin* (Law Rep. 2 Eq. 404) disapproved - - - - 639
See WILL. 12.

—— *McKay's Case* (2 Ch. D. 1) followed - 738
See COMPANY. 11.

—— *Mayer* v. *Murray* (8 Ch. D. 424) considered
See PRACTICE. 1. [534

—— *Minors* v. *Battison* 1 App. Cas. 428) considered - - - - 639
See WILL. 12.

—— *Morgan* v. *Knight* (15 C. B. (N.S.) 669) followed - - - - 380
See BANKRUPTCY. 10.

—— *Neate* v. *Pink* (3 Mac. & G. 476) explained
See PRACTICE. 14. [839

—— *Pearson's Case* (5 Ch. D. 536) followed 738
See COMPANY. 11.

—— *Pyer* v. *Carter* (1 H. & N. 916) dissented from - - - - - 31
See EASEMENT. 1.

—— *Reg.* v. *Wycombe Railway Company* (Law Rep. 2 Q. B. 310) followed - 274
See RAILWAY.

—— *Spargo's Case* (Law Rep. 8 Ch. 407) distinguished - - - - 511
See COMPANY. 12.

—— *Stevens* v. *Benning* (6 D. M. & G. 223) followed - - - - 886
See COPYRIGHT. 1.

—— *Suffield* v. *Brown* (4 D. J. & S. 185) explained - - - - 31
See EASEMENT. 1.

CASES—*continued.*

—— *Swansborough* v. *Coventry* (9 Bing. 305) explained - - - - 31
See EASEMENT. 1.

—— *Sweet* v. *Meredith* (4 Giff. 207) not followed
See VENDOR AND PURCHASER. 3. [666

—— *Sydney, Ex parte* (Law Rep. 10 Ch. 208), distinguished - - - - 380
See BANKRUPTCY. 10.

—— *Vane* v. *Vane* (1 Ch. D. 124) questioned
See LUNATIC. 1. [364

—— *Varley* v. *Coppard* (Law Rep. 7 C. P. 505) considered - - - - 461
See COVENANT.

—— *Warren* v. *Davies* (2 My. & K. 49) explained
See WILL. 9. [268

—— *Waterhouse* v. *Holmes* (2 Sim. 162) followed
See CHARITY. [211

—— *Watson* v. *Cox* (Law Rep. 15 Eq. 219) not followed - - - - 666
See VENDOR AND PURCHASER. 3.

—— *Weir, Ex parte* (Law Rep. 6 Ch. 875), followed - - - - 26
See BANKRUPTCY. 1.

—— *White* v. *Chitty* (Law Rep. 1 Eq. 372) questioned - - - - 152
See WILL. 2.

—— *Wilson* v. *Atkinson* (4 D. J. & S. 455) 872
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CASH PAYMENT—Paid-up shares - - 850
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CHARGE ON ALMSHOUSE—Legacy to pay off—Mortmain - - - - 211
See CHARITY.

CHARGING ORDER—Solicitor - - 880
See SOLICITOR. 1.

CHARITY—*Will*—*Legacy*—*Mortmain*—*Bequest of Stock to pay off Charges on Almshouse.*] A testatrix bequeathed stock to trustees to be applied "for or towards payment of all or any debt or debts, dues, demands, charges, or claims whatsoever, which may be owing or chargeable upon or in any manner claimable against" an almshouse situated on land in mortmain:—*Held*, that the bequest was void under the *Statute of Mortmain* (9 Geo. 2, c. 36) as in substance a gift of stock to be laid out or disposed of in the purchase of a charge or incumbrance affecting land in mortmain. *Corbyn* v. *French* (4 Ves. 418) and *Waterhouse* v. *Holmes* (2 Sim. 162) followed. *In re* LYNALL'S TRUSTS - - - - - - 211

—— Land taken by public company—New scheme—Costs - - - 178
See LANDS CLAUSES ACT.

CHARTERPARTY - - - - 568
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CHOSE IN ACTION—Married woman - - 256
See HUSBAND AND WIFE 4.

CLAIM—In winding-up—Plaintiff in action 681
See COMPANY. 17.

COMBINATION—Patent - - - 826
See Patent. 1.

COMPANY—*Action by Shareholder—Right to use Name of Company—Company made Defendant.*] Where an action was brought by a shareholder in the name of the company against the directors, alleging misapplication of the funds of the company, and a large majority of the shareholders had passed a resolution that the name of the company should not be used in the action :—*Held*, that the company must be struck out as Plaintiff; but liberty given to amend the writ by adding the company as Defendant. Silber Light Company *v.* Silber - - - - - 717

2. —— *Alteration of Articles—Proviso against Alteration—Resolution of General Meeting—Companies Act*, 1862, *s.* 50.] A company cannot contract itself out of the provisions of sect. 50 of the *Companies Act*, 1862, by a clause in its articles excepting any regulation contained in the articles from the operation of the section, and a resolution of a general meeting of the company to alter or modify such regulation will be valid. Walker *v.* London Tramways Company - - 705

3. —— *Guarantee of Dividend of 5 per Cent.—Return of Capital—Companies Act*, 1862, *s.* 12.] *J.* contracted with a trustee for an intended company to sell to the company a coal mine and works for £35,000, of which £10,000 was to be paid in money and the remainder in paid-up shares of the company; and he agreed to pay the company during the first two years of its incorporation such a sum as together with the net profits of the company would be equal to interest at 5 per cent. on the paid-up capital; such money to be repaid to him in a certain event. The company was formed, and the contract was recited and adopted in the articles of association. The profits not being sufficient to pay 5 per cent., *J.* paid a sum of money to the directors for distribution among the shareholders to make up the deficiency in pursuance of his contract. After the last payment became due, but before it was paid, the company was wound up voluntarily, and *J.* paid to the shareholders the amount necessary to bring the last dividend up to £5 per cent. The liquidator claimed the money as part of the assets of the company :—*Held* (reversing the decision of *Hall*, V.C.), that the money due from *J.* under his guarantee was properly payable to the shareholders, and was not part of the assets of the company; and that the contract was valid, and was not an evasion of the *Companies Act*, 1862, s. 12. *In re* South Llanharran Colliery Company. *Ex parte* Jegon - - - - **C. A.** 503

4. —— *Mortgage of Undertaking—Advance—Notice—Power to borrow.*] The mortgage of the property and undertaking of a company to secure debenture-holders or mortgagees in an equivalent position does not prevent the company from making a valid charge on a specific asset as a security for an advance of money necessary for carrying on the business.—A trading company has general power to borrow money to an extent which is reasonable and necessary for the purposes of the business.—A company assigned to mortgagees all their land, fixtures, and stock-in-trade, and their undertaking, by way of security for a sum of money then due. The company afterwards borrowed money for payment of wages and carrying on the business, and assigned to the lenders, who were aware of the previous mortgage, a sum of money which would become due to the company when certain work was completed. The lenders gave notice of this to the persons liable to pay the money. The work was completed after a winding-up order, and the money paid into Court :—*Held*, that the lenders had a claim on the money so paid into Court, in priority to the claim of the mortgagees of the undertaking. *In re* Hamilton's Windsor Ironworks. *Ex parte* Pitman & Edwards - - - - 707

5. —— *Reduction of Capital—Consent of Creditors—Deposit of Amount of Debt—Limit of Time for use of Words "and Reduced"—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 13, 14.] On the hearing of a petition by a company for the confirmation of a special resolution for the reduction of its capital, three debenture holders for sums amounting together to £4000, who had not consented in writing to the proposed reduction and had not attended in Chambers to object, in pursuance of the ordinary notices and advertisements, did not appear :—*Held*, that they could not be taken to have consented to the reduction, but that a consent brief on their behalf must be produced, or the amount of their debentures must be deposited in Court.—*In re Crédit Foncier of England* (Law Rep. 11 Eq. 356) not followed.—*Held* also, that the company must continue to use the words "and reduced," as part of their name, for fourteen days. *In re* Patent Ventilating Granary Company - - - - 254

6. —— *Winding-up — Contributory — Application to discharge Order made in Chambers—Limit of Time—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 124.] As a general rule an application to discharge an order made in Chambers to place a person on the list of contributories of a company in liquidation ought to be made within the time (three weeks) which is limited by sect. 124 of the *Companies Act*, 1862, for bringing an appeal.—*Ex parte Brown* (Law Rep. 9 Ch. 304) and *Dickson* v. *Harrison* (Law Rep. 9 Ch. 243) followed. *In re* Elham Valley Railway Company. Dickson's Case - - - 298

7. —— *Winding-up—Contributory—Assurance Company—Mutual Principle—Shareholders and Assurance Members—Policy-holder with Profits—Companies Act*, 1862, *s.* 23.] An unlimited assurance company was formed upon the mutual principle for granting assurances upon lives with or without participation in profits with a capital stated by the memorandum of association to be divided between shareholders. The articles of association provided that the company should at first consist of two classes of members, namely, shareholders, so long as there should be any shareholders, and assurance members, defined to mean policy-holders with participation in profits and registered as members of the company; and when the shareholders should be paid off under the scheme provided for, then the company was to consist of assurance members only, who were entitled to equal powers of electing and of becoming directors; but no person to be entitled to be registered in respect of any policy until he should have signed an agreement to become a member.

COMPANY—*continued.*

The payment of a premium was to entitle a policy-holder, if registered, to be a member.—Miss *W.* signed a proposal in May, 1873, for a policy with profits, which was to be the basis of the policy, and thereby she agreed to execute the articles of association when required. The policy recited the proposal, and that Miss *W.* had agreed to become a member upon the basis of that contract, and that the policy was to be subject to the articles of association. Premiums were regularly paid till the company was wound up in 1878, but Miss *W.'s* name was not entered on the register:—*Held*, that by the terms of the proposal which engrafted the articles of association, and by signing the policy, and by the payment of premiums, Miss *W.* had acceded to the articles and had agreed to become an assurance member of the company; and that the Court had power to rectify the omission upon the register of the company, and to place her name thereon and on the list of contributories:—*Held*, also, that there was nothing in the *Companies Act*, 1862, or in the memorandum of association, which precluded the introduction by the articles of two classes of members, viz., shareholders, and assurance members not holding shares. *In re* ALBION ASSURANCE SOCIETY. WINSTONE'S CASE - - 239

8. —— *Winding-up — Contributory — Bankrupts and their Trustees — Disclaimer.*] In the winding-up of a company a shareholder who has become bankrupt cannot be placed on the list of present contributories, neither can his trustee in a bankruptcy, whether prior or subsequent to the winding-up, be on the list if he shall have executed a disclaimer under the *Bankruptcy Act*, 1869, s. 23. *In re* WEST OF ENGLAND BANK. *Ex parte* BUDDEN AND ROBERTS - - - - - - 288

9. —— *Winding-up—Contributory Creditor—Right of Set-off—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.] The rule that a contributory cannot set off a judgment debt due to him from the company against calls made upon him by the official liquidator in the winding-up of the company, has not been affected by the *Judicature Act*, 1875, s. 10, which provides that in a winding-up the same rules shall apply as are in force in bankruptcy. *In re* GENERAL WORKS COMPANY. GILL'S CASE - - - - - - - 755

10. —— *Winding-up—Contributory—Director—Qualification—Lapse of Time.*] *F.* and *G.*, in July, 1866, subscribed, at the request of *N.*, whose firm was constituted a company, limited, the memorandum of association for one share each. The company was registered in September, 1866. *F.* was entered in the register for one share and *G.* for four shares. They were not, as deposed by *F.*, to incur any liability, or to pay any moneys in respect of the shares. *G.* was, by one of the articles, named a director, and appointed a managing director. By another article it was provided that every director should at the time of his appointment and thenceforth while in office hold four shares, and if he should cease to do so his office should become vacant. *G.* acted as director for about two months in 1866. *F.* and *G.* having been asked to pay the sum due on allotment and the calls, the amounts of which had been debited to them in the company's ledger, they, in November, 1867, requested the directors to cancel the shares, and at a board meeting on the 8th of November, 1867, it was resolved that the request be acceded to, and entries were made in the company's books to that effect. There were articles of association which stated that if calls were not paid the shares would be liable to be forfeited, and that the directors might extinguish or otherwise dispose of any shares which might have been forfeited. In 1876 the company, its business having in 1874 been sold to another company, was ordered to be wound up. *G.* died many years ago:—*Held*, that *F.* must be placed on the list of contributories for one share and the executors of *G.* for four shares. *In re* ESPARTO TRADING COMPANY - - - - - - 191

11. —— *Winding-up—Director—Shares given to Director by Promoters—Trustee for the Company—Misfeasance—Amount and nature of Relief—Promoter.*] The principles laid down in *McKay's Case* (2 Ch. D. 1) and *Pearson's Case* (5 Ch. D. 336), viz., that a director being in a fiduciary position to his company cannot retain a consideration received by him from the promoters as an inducement to become a director; and, if the consideration has been a gift of fully paid-up shares, that he may be compelled not only to restore the shares, but to account to the company for the highest value to be attributed to them since they have been in his possession—are equally applicable to proceedings in an action by the company to recover the value of the shares, as to proceedings under the *Companies Act*, 1862, s. 165, for the same purpose.—The director is further chargeable with interest on the highest value of the shares.—Previously to the incorporation of a company fifty fully paid up ordinary shares were offered to *G.* by the promoters to induce him to act as a director. *G.* consented to act as a director, and fifty shares of £100 each (part of a large number of paid-up shares retained as commission by the promoters on the sale of the works to the company) were transferred into his name without any consideration. *G.* acted as director for three years, and assisted in carrying into effect the contracts for purchase, but was not aware of the amount of commission retained by the promoters. In 1871 these ordinary shares were quoted at £80 a share. In 1874 *G.* ceased to be a director. In 1877, when these shares were only quoted at £1 per share, the company commenced an action against *G.*, claiming a declaration that he was a trustee of these fifty shares for the company, or of the value of them at the election of the company with interest, and for an account:—*Held*, that *G.* was a trustee of these shares for the company; that restitution of these shares was not sufficient; and that as the company had elected to take the value of these shares, *G.* must pay to the company £80 per share on each of the shares transferred to him, with interest at 4 per cent. from the date of transfer, and the costs of the action. NANT-Y-GLO AND BLAINA IRONWORKS COMPANY *v.* GRAVE 738

12. —— *Winding-up—Contributory—Paid-up Shares—Payment in Cash—Consideration of past Services—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] The proprietor of a newspaper agreed with a company to insert for them a series of

COMPANY—*continued.*

advertisements in his newspaper, and to accept payment of his account in fully paid-up shares. He inserted the advertisements and sent in his account to the company. The company accepted the account and allotted him fully paid-up shares to the amount thereof. The contract was not registered in pursuance of the *Companies Act*, 1867, s. 25, and the company was afterwards wound up:—*Held* (reversing the decision of *Hall*, V.C.), that, the allottee having originally agreed to accept shares in payment of his account, the company never came under any liability to pay for the advertisements in cash; and therefore that the allottee must be placed on the list of contributories for unpaid shares.—*Fothergill's Case* (Law Rep. 8 Ch. 270) followed.—*Spargo's Case* (Law Rep. 8 Ch. 407) distinguished. *In re* Government Security Fire Insurance Company. White's Case - - - 511

13. —— *Winding-up—Contributory—Paid-up Shares—Companies Act*, 1867, *s.* 25—*Money credited to Shareholder—Equivalent to Cash Payment—Costs.*] Where an agreement was entered into between a company and one of its directors that, in consideration of his giving up certain benefits, the director should receive a sum of money equal to three-fourths of the amount paid up by him upon his shares, and that sum was credited to him in the books of the company in pursuance of the agreement:—*Held*, that the amount so credited to the director was equal to a cash payment by him within the meaning of the 25th section of the *Companies Act*, 1867; and that there was nothing fraudulent or improper in such an agreement being entered into. *In re* Regent United Service Stores. *Ex parte* Bentley - - 850

14. —— *Winding-up—Contributory—Married Woman—Shares held by Wife before Marriage—Liability of Husband—Married Women's Property Act*, 1874—*Companies Act*, 1862, *s.* 78.] A woman, being entitled absolutely to shares in a company, married in May, 1878, and before the marriage the shares were settled for her own benefit. Upon the winding-up of the company:—*Held*, that the liability of the husband to contribute to the assets of the company was not limited by the *Married Women's Property Act*, 1874, to the interest acquired in right of his wife, but that he was liable as a contributory in his own right under the 78th section of the *Companies Act*, 1862. *In re* West of England Bank. *Ex parte* Hatcher - - - - - 284

15. —— *Winding-up—Demise of Premises to Company—Rent in Arrear—Distraint Warrant—Liquidation under Supervision—Sale by Liquidator of Company's Machinery, &c.—Claim by Landlords to be paid Rent in full—Companies Act*, 1862, *s.* 87—*Bankruptcy Act*, 1869, *s.* 34—*Judicature Act*, 1875, *s.* 10.] Landlords demised premises to a company for a term, and, the rent being in arrear, they issued a warrant of distraint, but, on the request of directors of the company, did not enforce it. The company went into voluntary liquidation, and that was by order continued under the supervision of the Court. The company were possessed of machinery and other things on the premises, and after a correspondence between the parties the liquidator sold them by auction on

COMPANY—*continued.*

the premises, and by order paid the proceeds of sale to a separate account.—Motion on behalf of the landlords for directions to the liquidator to pay them the rent which accrued before and after the liquidation out of the proceeds of sale, and their costs out of the assets of the company, refused, but without costs.—*In re Coal Consumers Association* (4 Ch. D. 625) followed. *In re* Bridgewater Engineering Company - - - 181

16. —— *Winding-up—Jurisdiction—Enforcing Compromise with Stranger—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7.] An order having been made to wind up a company, the holder of debentures issued by the company took out a summons in the winding-up to enforce his security. The Chief Clerk, on the 10th of January, held that the issue of the debentures was *ultrà vires*, and that the summons must be dismissed, unless the applicant should before the 19th of January require an adjournment before the Vice-Chancellor. On the 17th of January the applicant gave notice that he desired the adjournment, and the summons was set down for hearing by the Vice-Chancellor on the 31st of January. On that day, negotiations having been meanwhile opened between the liquidator and the applicant for a compromise of his claim, the summons was ordered to stand over generally, to be restored to the list on application. The negotiations resulted in an agreement, which was approved by the creditors and sanctioned by the Vice-Chancellor, that the liquidator should sell all the assets of the company to the applicant, he paying 6*d.* in the pound to the creditors, in discharge of their debts, and the costs of the liquidation. The applicant paid the 6*d.* in the pound, and part of the costs. The liquidator took out a summons in the winding-up to enforce the payment of the remainder of the costs:—*Held*, that the applicant had by his own summons submitted the determination of his rights to the Court in the winding-up; that that summons was still a pending matter; and that, consequently, by virtue of sect. 24, sub-sect. 7, of the *Judicature Act*, 1873, the Court had jurisdiction in the winding-up to enforce the compromise. *In re* Gaudet Frères Steamship Company - - - - - 882

17. —— *Winding-up Order pending Action against Company—Order to dismiss for want of Prosecution — Subsequent Claim by Plaintiff.*] Where an action had been commenced against a company and continued by leave after a winding-up order, and before trial an order had been obtained to dismiss the action for want of prosecution:—*Held*, that the Plaintiff in the action was not debarred from bringing forward a claim in the same matter in the winding-up. *In re* Orrell Colliery and Fire-Brick Company 681

18. —— *Winding-up—Power to Official Liquidator to Act without previous Sanction or Interference of the Court.*] Form of order under a compulsory winding-up giving the official liquidator power to do all acts required or authorized to be done without the previous sanction or interference of the Court. *In re* Rochdale Property and General Finance Company - - 775

19. —— *Winding-up—Preliminary Expenses—Costs of obtaining Special Act to be paid by*

COMPANY—*continued.*

Company—Work done by Clerk to Promoter.] The special Act of a tramway company provided that the costs of and incident to the preparing for, obtaining, and passing of the Act should be paid by the company:—*Held* (affirming the decision of *Fry*, J.), that a person who had, as clerk to a promoter of the company, performed work in relation to the obtaining of the Act, but who had looked only to the promoters for his remuneration, could not prove in the winding-up of the company in respect of the work so performed by him. *In re* Kent Tramways Company - C. A. 312

20. —— *Winding-up—Proof—Creditor and Shareholder—Dividend on Debt—Judicature Act*, 1875, *s.* 10.] A creditor of a banking company in liquidation who is also a shareholder in the company is entitled to receive a dividend on his debt if he has paid all the calls made upon him, and the law in that respect has not been altered by the 10th section of the *Judicature Act*, 1875. *In re* West of England Bank. *Ex parte* Brown [823

21. —— *Winding-up—Unregistered Loan Society under* 3 & 4 *Vict. c.* 110, *with less than Seven Members—Companies Act*, 1862, *ss.* 199, 200—*Action for Dissolution of Partnership—Order for Dissolution and Winding-up.*] On a creditor's petition for the winding-up of an unregistered loan society, formed under 3 & 4 Vict. c. 110, the members of which formerly exceeded seven in number but were now only four:—*Held*, that, having regard to sects. 199 and 200 of the *Companies Act*, 1862, a winding-up order could not be made when the number of members had at the date of the petition fallen below seven. *In re* Bolton Benefit Loan Society. Coop *v.* Booth [679

22. —— *Winding-up—Voluntary Winding-up—Removal of Liquidator by the Court—Companies Act*, 1862, *s.* 141—"*Due Cause shewn.*"] The jurisdiction of the Court to remove a liquidator under sect. 141 of the *Companies Act*, 1862, for "due cause shewn" is not to be exercised in the same way as if the power had been for the Court to remove the liquidator "if the Court shall think fit." Some unfitness in the liquidator must be shewn in order to justify his removal, and the removing him is not a matter of pure judicial discretion.—The secretary of a company was appointed liquidator under a voluntary winding-up. He paid the debts and completed the winding-up, except that a small sum remained in his hands for division among the contributories. A contributory took proceedings to make the liquidator and two of the directors liable for sums for which he alleged them to have made themselves accountable before the winding-up. The liquidator was intimate with the two directors, had refused to take proceedings against one of them, and expressed a decided view in favour of their conduct in the matters complained of. The Court was of opinion that a *primâ facie* case, which called for an answer, was made out against the liquidator and also against the two directors:—*Held*, by *Bacon*, V.C., and by the Court of Appeal, that the case was one in which due cause was shewn for removing the liquidator. *In re* Sir John Moore Gold Mining Company - - C. A. 325

COMPANY—*continued.*

23. —— *Winding-up—Witness—Companies Act*, 1862, *s.* 115—*Power to summon Persons whom the Court may deem capable of giving Information.*] Where a Judge has under the *Companies Act*, 1862, s. 115, ordered persons to be summoned for examination on the ground that he deems them capable of giving information concerning the trade dealings, estate, or effects of the company, the Court of Appeal will not interfere with his discretion unless in an extreme case.—*Semble*, that a person so summoned to be examined has no *locus standi* to appeal against the order directing him to attend for examination. *In re* Gold Company - - - - C. A. 77

COMPOSITION - - - - 915
See Bankruptcy. 9.

COMPROMISE—Winding-up—Stranger to proceedings - - - - 882
See Company. 16.

CONDITIONS OF SALE - - 1, 131
See Vendor and Purchaser. 1, 2.

CONSIDERATION — Assignment of all debtor's property - - - - 314
See Bankruptcy. 2.

—— Bill of sale - - - - 908
See Bills of Sale Act.

—— Paid-up shares—Past services - 511
See Company. 12.

CONTRACT—Rescission—Damages - 666
See Vendor and Purchaser. 3.

CONTRIBUTORY—Company.
See Company. 6—14.

CONVEYANCING COUNSEL OF COURT - 131
See Vendor and Purchaser. 1.

COPYRIGHT—*Author and Publisher—Publishing Agreement—Assignability—Action for Piracy of Copyright—Notice of Objections to Plaintiffs' Title—Engravings—Delivery up of Blocks—Practice—Application to expunge Registration—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 14, 16, 23, 24.] The joint authors of a book (one of whom composed the letterpress, and the other sketched the drawings from which the illustrations were engraved) entered into a verbal agreement with a firm of publishers, by which the firm were to engrave the illustrations and to print and publish the book. If the publication resulted in a loss the firm were to bear the whole of it; if there was a profit, they were to pay half of it to the authors. The profits were to be ascertained after deducting the cost of the engraving, printing, and publication, but without allowing any sum to the authors for the illustrations and letterpress. The book was published, and the publication resulted in a profit:—*Held*, that the agreement was merely personal to the individuals then composing the publishers' firm, and that the benefit of it could not, without the consent of the authors, be assigned by the publishers' firm to a firm which had succeeded to their business, but which contained none of the partners of the original firm.—*Stevens v. Benning* (1 K. & J. 168; 6 D. M. & G. 223) followed.—The successors of the original firm were accordingly restrained from publishing the book.—The Plaintiffs in the action were the author of the letterpress and the daughter of the

COPYRIGHT—*continued.*

other joint author, who was dead. The statement of claim alleged that her father had by his will appointed her mother his sole executrix and universal legatee, and that, she having since died, the daughter had administered to her estate. But it was not alleged that the mother had assented to the bequest made to her by the father. The Plaintiffs had registered themselves at *Stationers' Hall* as joint owners of the copyright of the book, and the Defendants (the successors of the original firm of publishers) had afterwards registered themselves as the owners. At the trial the Defendants objected that the daughter did not represent her father's estate. The objection had not been taken in the statement of defence, and no notice in writing of it had been given to the Plaintiffs under sect. 16 of the *Copyright Act*:—*Held*, that the objection could not be relied on at the trial.—The drawings on the blocks from which the illustrations of the book were engraved were sketched by the author of the drawings himself:—*Held*, that, having regard to the terms of the agreement, the blocks themselves were not the property of either the Plaintiffs or the Defendants, but that the Defendants must deliver them up to the Plaintiffs.—The Plaintiffs did not in their statement of claim expressly ask that the registration of the Defendants as owners of the copyright might be expunged:—*Held*, that an order to expunge that registration could not be made at the trial, but that the Plaintiffs must make a summary application for that purpose under sect. 14 of the Act.—Upon motion by Defendants to vary the decree as to the delivery up of unsold copies:—*Held*, that the Plaintiffs not having been the registered proprietors of the copyright at the time the copies were printed, were not entitled to have them delivered up under the 23rd section of the *Copyright Act*; but that the Court had power under its general jurisdiction to order delivery up for destruction of all articles created in violation of the Plaintiffs' rights.—The decree was therefore varied to this extent—that if profits had been made then (with the assent of the Defendants) the copies were to be delivered up to the Plaintiffs; but if no profits, then the copies to be delivered up for destruction. Hole *v.* Bradbury 886

2. —— *Designs—5 & 6 Vict. c. 100—Copy of Photograph.*] The portrait of a well-known public character, copied from a photograph and applied as a design upon earthenware, is not a new and original design within the meaning of the *Copyright of Designs Act.* Adams *v.* Clementson - - - - - - - 714

3. —— *Dramatic Copyright—License by one Part Owner—Action by other Part Owners against Licensee—Penalty—3 Will. 4, c. 15, s. 2—5 & 6 Vict. c. 45.*] The part owner of a dramatic entertainment cannot grant a license for its representation without the consent of all the other owners —Accordingly, where the registered owner of the undivided moiety of the copyright of an opera had alone granted a license for its representation, on an action by the other owners of the other moiety to recover the penalty under 3 Will. 4, c. 15, s. 2:—*Held*, that, having regard to that Act and the Act 5 & 6 Vict. c. 45, the license was illegally granted, and that the Defendant was liable to pay to the Plaintiffs one half of the penalty of 40*s.* for each representation. Powell *v.* Head - - - - - 686

COSTS—Lands Clauses Act - - - 178
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—— Member of company—Discovery—Witness
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—— Shorthand notes of evidence - - 383
See Practice. 6.

—— Trustee Relief Act - - - 175
See Trustee Relief Act.

COUNTER-CLAIM—Judicial separation - 605
See Husband and Wife. 1.

COURT—Sale by—Conveyancing counsel - 131
See Vendor and Purchaser. 1.

COVENANT—*Lease—Covenant against parting with Possession—Partners.*] A lease was granted to two partners, *B.* and *H.*, as joint tenants. The lessees covenanted that they, their executors, administrators, or assigns, or any or either of them, would not, during the term, assign, underlet, or part with the possession of the demised property to any person or persons without the written consent of the lessor; and there was a proviso for re-entry on the breach of any of the covenants. The partners dissolved partnership, and agreed that the partnership property should be made over to *B.*, and that the leasehold property should be assigned to him with the consent of the lessor, if such consent could be obtained, and recited, as the fact was, that *A.* had given up sole possession of the leaseholds to *B.* Consent was not obtained, and no assignment of the leasehold was executed, but *B.*, from the time of the dissolution, remained in sole possession:—*Held* (affirming the decision of *Bacon*, V.C.), that there had been no breach of the covenant, and that the proviso for re-entry had not come into operation.—*Varley* v. *Coppard* (Law Rep. 7 C. P. 505) considered. Corporation of Bristol *v.* Westcott - - C. A. 461

—— Deed of separation - - - 605
See Husband and Wife. 1.

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CREDITOR—Company—Consent of creditors—Reduction of capital - - 254
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—— Purchase—Forfeiture - - - 1
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DIRECTOR—Liability of - - - 738
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DISTRESS—Rent in arrear—Company in liquidation - - - - - 181
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DYING WITHOUT ISSUE - - - 205
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ELDEST SON - - - - - 170
See Will. 5.

ELECTION—Ambiguous bequest - - 683
See Will. 11.

EMBARRASSING PLEADINGS - - 787
See Practice. 11.

EASEMENT—*Light and Air—Implied Grant—Implied Reservation—Grants of adjoining Tenements—Sales at same Time.*] By the grant of part of a tenement there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted and have been hitherto used therewith; but as a general rule there is no corresponding implication in favour of the grantor, though there are certain exceptions to this, as in the case of ways of necessity.—A workshop and an adjacent piece of land belonging to the same owner were put up for sale by auction. The workshop was not then sold, but the piece of land was then sold, and was soon afterwards conveyed to the purchaser. A month after this the vendor agreed to sell the workshop to another person, and in due time conveyed it to him. The workshop had windows overlooking and receiving their light from the piece of land first sold:—*Held*, that, as the vendor had not when he conveyed the piece of land reserved the right of access of light to the windows, no such right passed to the purchaser of the workshop, and that the purchaser of the piece of land could build so as to obstruct the windows of the workshop:—*Held*, that, whatever might have been the case had both lots been sold at the same sale by auction, there was, under the circumstances, no implied reservation of any right over the piece of land first sold.—Judgment of *Bacon*, V.C., affirmed.—The decision in *Pyer* v. *Carter* (1 H. & N. 916) dissented from.—*Suffield* v. *Brown* (4 D. J. & S. 185) and *Swansborough* v. *Coventry* (9 Bing. 305) explained. Wheeldon *v.* Burrows **C. A.** 31

2. —— *Sign-board of Public-house—Twenty Years User—Implication of Grant.*] The Plaintiffs, the owners of a public-house, claimed the right to affix a sign-board to the wall of the Defendants' house. The sign-board had been so affixed for upwards of forty years. The two houses had formerly belonged to the same owner, the Defendants' house having been granted away by him before the Plaintiffs' house. When he first became owner of the two houses the Plaintiffs' house was not occupied as a public-house. It did not, however, appear whether the sign-board was first affixed to the Defendants' house during the common ownership:—*Held*, that it could not be assumed that it was first affixed during the common ownership:—*Held*, also, that the easement claimed was a legal one, and that a grant of it by the Defendants' predecessors in title to the Plaintiffs' predecessors in title must be presumed.—And an injunction was granted to restrain the Defendants from removing the sign-board. Moody *v.* Steggles - - - 261

ENGRAVINGS—Copyright - - - 886
See Copyright. 1.

EQUITY TO SETTLEMENT—Order for, before further consideration - - 189
See Husband and Wife. 2.

ESTATE TAIL—Lunatic—Power of Court to bar entail - - - - 333
See Lunatic. 2.

EVIDENCE—*Declaration by Deceased Parent—Pedigree—Illegitimacy.*] In a case of pedigree the declaration of a deceased father is admissible evidence of the illegitimacy of the child when the question in dispute is whether the father and mother were ever married.—And such a declaration may outweigh evidence shewing that the

EVIDENCE—*continued.*
father and mother were reputed to be husband and wife.—*Goodright* v. *Moss* (2 Cowp. 591) followed. MURRAY *v.* MILNER - - - - - 845

2. —— *Public Document—Report of Department of State—Entry in Discharge of Official Duty.*] Reports of a public department of state are not admissible as evidence of facts stated therein.—Observations on the practice of the Committee of Privileges of the House of Lords as to the admission of recitals in private Acts of Parliament as evidence in Peerage cases—Entries by a person in the discharge of his official duty are only evidence of the facts therein stated when the facts are parts of a transaction effected by such person himself which it is his duty to record. —In a suit for ascertaining the next of kin of an intestate, the principal question was as to the identity of *A. M.*, the father of the intestate, with a person of that name who was born at *Q.*, near *Genoa.* In support of such identity the Plaintiff tendered in evidence a photograph copy of a report of a public department of the Genoese Government which had been directed to report whether it was expedient to appoint *A. M.* a diplomatic agent of the government. The report certified his fitness for the office, and also certified that he was born at *Q.*, and was forty-five years of age; and that these facts had been ascertained from persons well acquainted with him:—*Held* (affirming the decision of *Malins,* V.C.), that, assuming the authenticity of the document of which a copy was produced, it could not be used in evidence of the place or date of birth of *A. M.*, either on the ground of its being a public document, or as a statement of contemporaneous facts by persons in discharge of an official duty. POLINI *v.* GRAY. STURLA *v.* FRECCIA - - - C. A. 411

—— Patent - - - - - 826
See PATENT. 1.

—— Rejection of - - - - 553
See PRACTICE. 4.

EXECUTION—Levied in *England*—Foreigner
See JURISDICTION. [522

EXECUTOR—*Retainer—Payment into Court.*] In an action by residuary legatees against an executor to administer an insolvent estate, after the usual administration judgment had been given an order was made in Chambers, on the application of the Plaintiffs, and in the presence of the executor, pursuant to which an insurance company paid certain policy moneys which formed part of the assets of the testator into Court to the credit of the cause.—Upon the further consideration of the action, the executor, who was a creditor of the testator, claimed to retain his own debt out of the moneys so paid in, in priority to the costs of the action and the debts of the other creditors:—*Held,* (reversing the decision of *Hall,* V.C.), that the payment into Court was in substance a payment by the executor, and that he was entitled to a right of retainer out of the fund. RICHMOND *v.* WHITE - - - - - C. A. 361

2. —— *Retainer—Secured Creditor—38 & 39 Vict. c.* 77, *s.* 10.] An executor's right to retain a debt due to himself does not make him a secured creditor within the meaning of the *Judicature Act,* 1875, s. 10, and his right to retain is not affected by that section. LEE *v.* NUTTALL C. A. 61

—— Devise to—Charge of debts - - 268
See WILL. 9.

EXECUTORY TRUST - - - 691
See WILL. 3.

EXTENSION OF TIME—Appeal - - 305
See PRACTICE. 3.

—— Appeal—Bankruptcy - - - 308
See BANKRUPTCY. 11.

FALSE REPRESENTATION—*Agreement to settle—Marriage on Faith of Representation.*] An unattested paper signed by *A.* and by him handed to *B.* stated that as a mark of his esteem and great friendship he agreed to allow *B.* £500 a year, and that after his (*A.'s*) death he had in lieu thereof bequeathed to him £10,000.—*B.* took this document to *C.*, who thereupon consented to the marriage of her daughter with *B.*, such consent having hitherto been withheld on the ground of *B.'s* want of means.—The marriage took place, but no settlement was made by *B.* on his wife. *A.* died about six months after signing the paper, having paid *B.* the first quarter of the allowance of £500 a year. His will contained no provision whatever in favour of *B.*:—*Held,* that assuming the consent of *C.* to her daughter's marriage with *B.* to have been given on the faith of the engagement contained in the paper, there was no such connection between *A.'s* promise or representation and the consent given by *C.* as to sustain a claim against *A.'s* estate. DASHWOOD *v.* JERMYN - - 776

—— Infant - - - - - 675
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See TENANT IN COMMON.

FOREIGNER — Patent — Communication from abroad - - - - 303
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—— Trading in *England* - - - 522
See JURISDICTION.

FORESHORE—*Use of Land—Injury to Neighbouring Landowner—Removal of Shingle—Overflow of Sea—Prerogative of Crown—Defence of Realm against Sea—Power to prevent Removal of Natural Barrier.*] *Semble,* that the owner of the foreshore in removing shingle therefrom for the purpose of sale, is using his land in a natural, not in a non-natural way, and would not, therefore, be on this ground responsible to a neighbouring landowner for the damage resulting from a consequent overflow of the sea.—But it is part of the prerogative, and it is the duty, of the Crown to preserve the realm from the inroads of the sea, and a subject is therefore not entitled to destroy a natural barrier against the sea.—Accordingly, in an action by the Attorney-General, on behalf of the Crown as owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the Defendant, the owner of the foreshore, from removing shingle therefrom so as to endanger the Crown land or expose it to the inroads of the sea. ATTORNEY-GENERAL *v.* TOMLINE - - 214

FORFEITURE—Clauses of - - - 152
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—— Deposit - - - - - - 1
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FRAUD—Claim on account of—Ordinary decree for accounts - - - 534
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GIFT—By husband to wife - - - 256
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—— Of two houses by owner of them - 683
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—— Leaseholds on trust to correspond with freeholds - - - - - - 691
See Will. 3.

GRANT—Implication—Easement - 31, 261
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GROWING CROPS—Cut by mortgagor—Injunction - - - - - 812
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GUARANTEE—Divided in shares in company
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—— Proof in bankruptcy - - - 557
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GUARDIAN—Person of unsound mind - 364
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HOUSE OF LORDS—Appeal to - 438, 454
See Practice. 5, 8.

HUSBAND AND WIFE—*Separation Deed, Action by Husband to enforce—Counter-claim by Wife for Judicial Separation—Cruelty—Lapse of Time—Breaches of Covenant—Custody of Children—Infants' Custody Act,* 1873 (36 & 37 *Vict. c.* 12).] Where a deed of separation had been executed between a husband and wife who had continued to live apart, and the wife more than five years afterwards, by counter-claim to an action by the husband to enforce the deed, claimed as against him a judicial separation on the ground of alleged cruelty:—*Held*, that her right to judicial separation was barred by lapse of time and by the execution of the deed of separation.—*Brown* v. *Brown* (Law Rep. 3 P. & D. 202) observed upon.—A married woman can contract to live apart from her husband, and the husband is entitled to come to the Court to enforce specific performance of such a contract.—A husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part.—Where, in a separation deed, the husband had covenanted to allow an infant child to reside with the wife, and had subsequently concurred as next friend of the infant in a petition under the *Infants' Custody Act* (36 Vict. c. 12) for the removal of the infant from the wife's custody which had been ordered by the Court:—*Held*, that this was not a breach of the husband's covenant.—Injunction granted to restrain the wife from suing for restitution of conjugal rights. Besant *v.* Wood - - 605

2. —— *Settlement—Equity to a Settlement—Administration Action—Further Consideration, Equity enforced before—Practice.*] In an administration action, after judgment but before further consideration, a married woman, who was absolutely entitled to a share of a fund in Court representing the residuary estate of the testator, presented a petition to enforce her equity to a settlement:—*Held*, that she was entitled to an immediate order, although the fund would not be actually distributable until further consideration, and the amount of her share in it had not yet been ascertained. *In re* Robinson's Settled Estate. Robinson *v.* Robinson - - 188

3. —— *Settlement—Wife's Property—Ultimate Trust for Next of Kin—"Die without having been married"—Husband's Life Interest determinable on Bankruptcy—Resulting Trust.*] By a settlement made on the second marriage of a widow of her property, a life estate for her separate use was given to the wife, followed by an estate to the husband for his life or until his bankruptcy. Provisions were then made for the children of the marriage and a son of the wife's former marriage. And it was declared that, if the son of the former marriage should die under twenty-one, and if there should be no child of the marriage who should attain twenty-one or marry under that age, then, subject and without prejudice to the trusts before declared, and after the death of the husband, and of the son of the former marriage under twenty-one, and the default or failure of children of the marriage, "which shall last happen," the trustees should hold the property, if the wife should survive the husband, in trust for her absolutely, but, if the husband should have survived the wife, in trust for such persons as the wife should by will appoint, and, subject thereto, in trust for her next of kin as if she had died intestate and "without having been married."—The wife died first, without having exercised the power of appointment. There were no issue of the marriage. The son of the former marriage survived his mother, but died under twenty-one. Before the wife's death the husband had filed a liquidation petition:—*Held*, that the infant son was entitled, as sole next of kin of his mother, to the trust fund.—*Wilson* v. *Atkinson* (4 D. J. & S. 455) followed.—But *held*, that the trust for the next of kin did not arise until after the death of the husband, and that consequently he was entitled to the income of the trust fund for his life, and that this interest had vested in the trustee under his liquidation. Upton *v.* Brown - - - 872

4. —— *Wife's Chose in Action—Reduction into Possession—Gift by Husband to Wife.*] A legacy, to which a married woman was entitled under a will, was paid by the executors by means of a cheque for £995, drawn to the order of the husband and wife. The husband and wife indorsed the cheque, and then went together to the husband's bankers, when the wife handed the cheque to the manager, and, in the presence and with the assent of the husband, told the manager to open an account in her own sole name, and to place to

HUSBAND AND WIFE—*continued.*
the credit of it £800, part of the £995, and to credit the residue to the husband's current account. This was done, and the wife afterwards, from time to time, drew cheques on the amount in her sole name. The husband never interfered with the account. The wife drew various cheques, for amounts varying from £20 to £50, in favour of the husband, for the purpose of those sums being employed by him in his business. Part of the money was, by the wife's directions, invested by the bankers in the purchase of some bonds, they sending her a memorandum which stated that they held the bonds as her property. The husband afterwards asked the wife to sign a memorandum charging her money and securities with the payment of the overdrawn balance of his account with the bankers, but she refused to do so:—*Held*, that the legacy had never been reduced into possession by the husband.—*Semble*, that even if it had been reduced into possession, there had been a gift of the £800 by the husband to the wife. PARKER *v.* LECHMERE - - 256

—— Bankruptcy of wife - - - 484
See BANKRUPTCY. 3.

—— Shares held by wife before marriage—Liability of husband - - - 284
See COMPANY. 14.

ILLEGITIMACY—Evidence - - 845
See EVIDENCE. 1.

IMPLICATION—Grant of easement 31, 261
See EASEMENT. 1, 2.

INFANT—*Lease—Misrepresentation as to Age—Use and Occupation—Injunction.*] In an action against an infant who had obtained a lease of a furnished house on an implied representation that he was of full age:—*Held*, that the lease must be declared void, and possession given up, and that the Defendant should be restrained by injunction from parting with the furniture; but that he was not liable for use and occupation. LEMPRIÈRE *v.* LANGE - - - - 675

—— Custody of - - - - 605
See HUSBAND AND WIFE. 1.

INFRINGEMENT—Patent - - - 826
See PATENT. 1.

INJUNCTION—Infant—Void lease - 675
See INFANT.

—— Interlocutory—Balance of convenience 468
See MARKET.

—— Local Board—Neglect of public duty 102
See NUISANCE.

—— Mortgagor cutting crops - - 812
See MORTGAGE.

—— Patent - - - - - - 13
See PATENT. 2.

—— Pending appeal to House of Lords - 438
See PRACTICE. 8.

INSURANCE COMPANY - - - 239
See COMPANY. 7.

INTERLOCUTORY APPLICATION—Production of documents - - - - 349
See SOLICITOR. 2.

INTERLOCUTORY ORDER—Time for appealing
See PRACTICE. 3. [305

INTESTACY—Residue—Exclusion of next of kin
See WILL. 1. [819

INVENTION—User of - - - 13
See PATENT. 2.

IRREGULARITY—Order to intervene - 152
See WILL. 2.

JOINT AND SEPARATE ESTATE - 557, 917
See BANKRUPTCY. 4, 6.

JOINT INVENTION—Patent - - 303
See PATENT. 3.

JOINT TENANT - - - - 813
See TENANT IN COMMON.

JUDICIAL SEPARATION - - - 605
See HUSBAND AND WIFE. 1.

JURISDICTION—*Court of Bankruptcy—Foreigner resident abroad but trading in England—Execution levied on Goods in England—Act of Bankruptcy—Construction of English Statute—Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 8—*Rules of Court,* 1875, *Order* IX., *r.* 6; *Order* XVI., *r.* 10; *Order* XLII., *r.* 8.] The English Court of Bankruptcy has no jurisdiction to make an adjudication of bankruptcy against a foreigner, domiciled and resident abroad, who has never been in *England*, even though he is a member of an English firm which has traded and contracted debts in *England*, and against which an execution in respect of a judgment debt above £50 has been levied by seizure and sale of goods of the firm in *England*. And in such a case the Court ought not to make an order for service out of the jurisdiction of a bankruptcy petition on the foreigner.—An act of bankruptcy must be a personal act or default, and it cannot be committed through an agent, nor by a firm as such.—*Primâ facie* an English statute affects only English subjects or foreigners who come, either permanently or temporarily, within the allegiance of the English Crown.—*Quære*, whether in all cases it is competent to sue a firm under Rules of Court, 1875, Order XVI., rule 10. *Ex parte* BLAIN. *In re* SAWERS. - C. A. 522

—— Chancery Division—Guardian of person of unsound mind - - - 364
See LUNATIC. 1.

—— Winding-up—Chancery Division - 882
See COMPANY. 16.

LANCASTER COURT—*Appeal from Court of County Palatine of Lancaster—Rules of Court,* 1875, *Order* LVIII., *r.* 15.] Order LVIII. of the Rules of Court, 1875, applies to appeals from the Court of the County Palatine of *Lancaster* as well as to appeals from the High Court of Justice, and the time for appealing is now regulated by rule 15 of that Order, and is no longer governed by the General Orders of 1855 regulating appeals from the Court of the County Palatine. LEE *v.* NUTTALL [C. A. 61

LANDLORD AND TENANT—Distress—Company in liquidation - - - 181
See COMPANY. 15.

—— Lien—Contract to assign - - 461
See COVENANT.

LANDS CLAUSES ACT—*Public Company—Taking Lands—Lands Clauses Consolidation Act*, 1845—*Costs of Petition—Charity—New Scheme—Payment of Income to New Trustees.*] A public company having taken lands belonging to a charity and paid the purchase-money into Court under the *Lands Clauses Consolidation Act*, the usual order was made for investment and payment of the income of the fund to the trustees of the charity or any two or more of them.—Afterwards, the charity having been practically superseded by the School Board, a new scheme was sanctioned whereby the charity was recast and new governors were substituted for the old trustees. The new governors then petitioned for payment out of part of the corpus towards the expenses of the new scheme, and for payment of the income of the remaining fund to the Petitioners or any two or more of them.—The company contended that they were not liable to pay the costs of a petition caused by a devolution of title subsequent to the taking of the land:—*Held*, that the change of interest having been caused, not by the act of the trustees, but by the reconstitution of the charity (an incident to which all charities were liable), the company were bound to pay the costs of the petition. *In re* Shakespeare Walk School - - 178

LEASE—Covenant - - - - 461
See Covenant.

—— Infant - - - - - 675
See Infant.

LEASEHOLDS—Gift of, on trusts to correspond with freeholds - - - 691
See Will. 3.

LEE NAVIGATION—Towing-path - - 383
See Towing-path.

LIABILITY—Husband—Shares of wife - 284
See Company. 14.

LICENSE—Dramatic copyright - - 686
See Copyright. 3.

LICENSE TO SEIZE GOODS - - - 314
See Bankruptcy. 2.

LIEN—Solicitor—Costs - 349, 858, 880
See Solicitor. 1, 2, 3.

LIFE ASSURANCE SOCIETY—Dividends—Apportionment Act - - - 655
See Apportionment.

LIGHT AND AIR - - - - 31
See Easement. 1.

LIQUIDATOR—Official—Power to act with sanction of Court - - - 775
See Company. 18.

—— Removal of - - - - 325
See Company. 22.

LOAN TO TRADER—Participation in profits 366
See Partnership. 2.

LOCAL BOARD - - - - 725
See Public Health Act.

—— Neglect of public duty—Mandamus—Injunction - - - - 102
See Nuisance.

LOCUS STANDI—Stranger to action—Application for payment - - - - 839
See Practice. 14.

LUNATIC—*Person of Unsound Mind not so found—Power of Chancery Division to appoint Guardian.*] Although the Chancery Division has power, in the administration of the trusts of the property of a person of unsound mind not so found, to give directions for his maintenance, it has no jurisdiction to appoint a guardian of his person.—*Vane* v. *Vane* (2 Ch. D. 124) questioned. *In re* Bligh - - - - - C. A. 364

2. —— *Power of Court to bar Lunatic's Estate Tail—Sale under Partition Act*—16 & 17 *Vict. c.* 70, *s.* 124—39 & 40 *Vict. c.* 17, *s.* 6.] The Court, under its Lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail; but it is the duty of the Court so to exercise it as not to affect the rights of the persons entitled in remainder to the estate.—Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for the partition of the estate, the Court, under the 6th section of the *Partition Act*, 1868, authorized the committee of the lunatic to request a sale and to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale. *In re* Pares. Lillingston *v.* Pares - - - - - C. A. 333

MANDAMUS—Local Board—Neglect of public duty - - - - - 102
See Nuisance.

MARKET—*Weekly Sale by Auction on different Day—Interlocutory Injunction—Balance of Convenience.*] The Plaintiffs were owners of the tolls of an ancient cattle market held weekly on Thursday. The Defendants, who were auctioneers, fitted up with stalls and pens a neighbouring piece of ground, and issued circulars stating that weekly sales of cattle by auction would be held there on Mondays. The Plaintiffs brought their action to restrain the Defendants from holding their proposed sales, as being an interference with the Plaintiffs' market:—*Held*, by the Master of the Rolls, that, having regard to modern facilities for traffic, a market on Monday was *primâ facie* an injury to a market on Thursday, that what the Defendants were doing was in fact the establishment of a rival market, and that an interlocutory injunction ought to be granted.—*Held*, on appeal, that, the Defendants undertaking to keep an account, an interlocutory injunction ought not to be granted, for that, if an injunction was granted and it turned out that the Defendants were in the right, there would be great difficulty in ascertaining the compensation to which they would be entitled, whereas, if an injunction was refused, and the Plaintiffs succeeded at the trial, there would be no difficulty in giving them compensation, and their market would suffer no permanent injury from the sales by the Defendants in the meantime. Elwes *v.* Payne - - 468

MARRIAGE—On faith of alleged agreement to settle - - - - 776
See False Representation.

MARRIAGE SETTLEMENT—Ultimate trust—Life interest of husband - - 872
See Husband and Wife. 3.

MARRIED WOMAN.
See HUSBAND AND WIFE. 1—4.

—— Bankruptcy - - - - 484
See BANKRUPTCY. 3.

MEMBER OF COMPANY—Discovery - 295
See PRACTICE. 7.

MEMORANDUM AS TO PRACTICE, Nov. 1875
See PRACTICE. 3. [305

MISLEADING CONDITIONS OF SALE - 131
See VENDOR AND PURCHASER. 1.

MISTAKE—Recital in will - - - 291
See WILL. 6.

MORTGAGE—*Growing Crops cut by Mortgagor—Injunction.*] A mortgagor presented a petition for liquidation of his estate, and the trustee appointed went into possession of the mortgaged lands and commenced cutting the growing crops. The mortgagee then put a man in possession and required the trustee to give up possession, which he declined to do.—In an action against the trustee an injunction was granted restraining him from cutting crops and from removing the crops cut after the demand made by the mortgagee. BAGNALL *v.* VILLAR - - - - 812

—— Redemption — Annuity — Right to policy effected by grantor - - 760
See ANNUITY.

—— Undertaking of company - - 707
See COMPANY. 4.

MORTMAIN - - - - - 211
See CHARITY.

MOTION FOR JUDGMENT—Admissions - 758
See PRACTICE. 2.

MUTUAL CREDITS - - - - 491
See BANKRUPTCY. 7.

MUTUAL INSURANCE—Assured member 239
See COMPANY. 7.

NAME OF COMPANY—Right to use - 717
See COMPANY. 1.

NEW TRIAL—Motion for - - - 553
See PRACTICE. 4.

NEXT OF KIN—Exclusion of—Intestacy—Residue - - - - 819
See WILL. 1.

NOTICE—Mortgage—Priority - - 707
See COMPANY. 4.

—— Objection—Copyright - - - 886
See COPYRIGHT. 3.

NUISANCE—*Pollution of Stream—Local Board—Neglect of Public Duty—Mandamus—Injunction—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 17, 19—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] A local board, under the *Public Health Act*, 1875, causing a nuisance by any act which, independently of the statute, would have given a cause of action to any person, may be made liable in damages, or be restrained by injunction, unless they can shew a justification under the powers of the statute. But if a local board do no act themselves to cause a nuisance, but neglect to perform their duty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerogative writ of mandamus; and *semble*, this jurisdiction, notwithstanding the 25th section of the *Judicature Act*, 1873, ought not to be exercised except by the Queen's Bench Division.—The Defendants were a local board constituted in November, 1875, under the *Public Health Act*, 1875. The Plaintiff complained that for some time before and since the Defendants became the sanitary authority, sewage was allowed to fall into a stream passing near his residence so as to pollute it and cause a nuisance to him. He complained to the Defendants in May, 1876, and nothing having been done he brought an action against them in July, 1876, for damages and an injunction: — *Held* (reversing the judgment of *Malins*, V.C.), that, assuming that an actionable nuisance existed, as the Defendants had themselves done no act to create or increase it, the Plaintiff had no cause of action. GLOSSOP *v.* HESTON AND ISLEWORTH LOCAL BOARD **C. A. 102**

OFFICIAL DUTY—Entry in discharge of—Evidence - - - - 411
See EVIDENCE. 2.

OFFICIAL LIQUIDATOR — Power to act with sanction of Court - - - 775
See COMPANY. 18.

OPTION OF PURCHASE—Superfluous land 1
See VENDOR AND PURCHASER. 2.

PARTICULARS OF BREACHES - - 826
See PATENT. 1.

PARTITION—Lunatic—Power of Court to bar entail - - - - 333
See LUNATIC. 2.

PARTNERSHIP — *Dissolution — Return of Premium—Misconduct of Partner paying Premium.*] When a partnership is dissolved before its natural expiration in consequence of the misconduct of a partner who has paid a premium, he is not entitled to a return of any part of the premium.—And, in such a case, if the premium agreed upon has not been actually paid before the dissolution, the partner who has agreed to pay it will be ordered to pay the whole of it, notwithstanding the dissolution. BLUCK *v.* CAPSTICK - - - 863

2. —— *Proof in Bankruptcy—Loan to Trader—Lender receiving Share of Profits—Partnership Law Amendment Act*, 1865 (28 & 29 *Vict. c.* 86, *Bovill's Act*), *ss.* 1, 5—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 32, 41.] The effect of sect. 5 of *Bovill's Act* is to prevent the lender of money to a trader, on the terms of receiving a share of the profits of his business, from proving for the loan in the bankruptcy of the borrower in competition with any of his creditors—not merely those creditors whose debts were contracted in relation to the business in respect of which the loan was made, or while that business was being carried on—but any of the creditors who are entitled to prove in the bankruptcy.—Till all the other creditors have been paid in full, such a lender is not entitled to prove for any purpose whatever.—In 1871 a loan was made to a trader, on the terms of the lender receiving half the profits of the business. In 1872, the trader being then insolvent, assigned all his property to a trustee, on

PARTNERSHIP—*continued.*

trust for sale, and out of the proceeds of sale to pay the lender a small sum, then to pay his creditors (other than the lender) in full, and afterwards to pay the lender the balance of his loan, with interest at 10 per cent. The lender was a party to this deed. The trustee realized the property, and paid the creditors (other than the lender) a dividend of 6*s.* in the pound. This exhausted the proceeds of sale, and the lender received nothing beyond the small payment made to him in the first instance. In 1875 all the creditors released the trustee, but they expressly reserved their rights against the trader. In 1879 the trader filed a liquidation petition:—*Held*, that the arrangement of 1872 did not, under the circumstances, amount to a repayment of the loan and a relending of the money on new terms, and that, consequently, the lender could not prove in the liquidation in competition with the other creditors. *Ex parte* TAYLOR. *In re* GRASON [C. A. 366

—— Assets in bankruptcy - - - 917
See BANKRUPTCY. 4.

—— Dissolution of—Assignment of lease to one partner - - - - 461
See COVENANT.

—— Dissolution—Unregistered loan society 679
See COMPANY. 21.

—— Farming business—Tenants in common 813
See TENANT IN COMMON.

—— Joint and several liability - - 557
See BANKRUPTCY. 6.

PATENT — *Combination Patent — Agency — Infringement—Evidence—Particulars of Breach—15 & 16 Vict. c. 83, s. 41.*] A patent consisted of the application of cards or strips of leather covered with wire to rollers at "wide distances." A person who contracted to clothe rollers and supplied to a "nailer" cards of such width that when applied to the rollers they must of necessity leave wide spaces, and who himself paid the nailer, was held to have infringed the patent, though he alleged that his business was that of a cardmaker only, and did not include the nailer's work.—*Semble*, the conclusion would have been the other way if he had merely supplied the cards without making the nailer his agent.—Particulars of breach of a patent alleged divers sales between certain dates, and particularly to two persons. An answer of the Defendant admitted a sale to *H.*, a third person. Evidence of the transactions with *H.* was admitted. SYKES *v.* HOWARTH - 826

2. —— *Injunction—User of Invention—Master of Ship.*] An action was brought against the master of a ship to restrain him from using pumps which were an infringement of the Plaintiff's letters patent. He denied having used any pumps which were an infringement of the patent, and did not suggest that the owners ought to be parties. It was shewn that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but had been so fitted up before the Defendant, who was not a part owner, had taken command of her; he had nothing to do with putting them on board, and they had never been worked in British waters.—*Bacon*, V.C., having granted an injunction to restrain the

PATENT—*continued.*

master from using the patented invention:—*Held*, by *Brett* and *Cotton*, L.JJ. (*dissentiente*, *James*, L.J.), that the injunction was rightly granted on the ground that the Defendant, being in command of a ship exclusively fitted up with pumps which were an infringement of the letters patent, was intending to use the patented invention. ADAIR *v.* YOUNG - - C. A. 13

3. —— *Petition to seal Patent—Communication from Abroad—Declaration—True and First Inventor.*] Upon the hearing of a petition that the Great Seal may be affixed to letters patent, the Lord Chancellor will not give effect to an objection going to a matter of form, such as an objection to the jurat of a declaration.—*W.* was an alien resident abroad. He acted as the agent of *M. & Co.*, and applied for letters patent in *England* for an invention of the latter. He made the usual statutory declaration, which was filed with his petition. In it *W.* was described as an alien resident abroad, and it was declared before H.B.M. consul at *Frankfort*:—Objection founded on these facts overruled.—Letters patent may be granted to an alien resident abroad for an invention communicated to him by another alien also resident abroad. *In re* WIRTH'S PATENT [L. C. 303

PAYMENT INTO COURT—District Registry 735
See PRACTICE. 9.

—— Purchase-money under Lands Clauses Act
See LANDS CLAUSES ACT. [178

—— Retainer by executor - - - 361
See EXECUTOR. 1.

—— Shares - - - - - 511
See COMPANY. 12.

PEDIGREE—Evidence - - - 845
See EVIDENCE. 1.

PENALTY—Violation of dramatic copyright 686
See COPYRIGHT. 3.

PERPETUITY—Will—Shifting clause - 691
See WILL. 3.

PERSON AGGRIEVED—Appeal in bankruptcy
See BANKRUPTCY. 12. [905

PETITION—Adjudication—Improper motive 480
See BANKRUPTCY. 5.

—— Charging Order—Solicitor - - 880
See SOLICITOR. 1.

—— Sealing patent - - - - 303
See PATENT. 3.

PHOTOGRAPH—Copy of—Copyright - 714
See COPYRIGHT. 2.

PLACE OF DISCHARGE - - - 568
See SHIP.

PLAINTIFF—Out of jurisdiction—Security for costs - - - - - 807
See PRACTICE. 16.

PLEADING - - - - 758, 787
See PRACTICE. 2, 10.

POLICY HOLDER—Mutual insurance company
See COMPANY. 7. [239

POLICY OF INSURANCE—Grantee of policy—Accounts—Right to money - 760
See ANNUITY.

POLLUTION OF STREAM - - - 102
See Nuisance.

POWER—*Appointment—Exercise of Power by Will—Residuary Gift—Wills Act* (1 *Vict. c.* 26), *s.* 27.] Under a settlement two sums of stock were vested in *A.*, *B.*, and *C.*, as trustees, upon trust as testatrix, a married woman, should by will appoint, and in default of appointment upon other trusts. Testatrix, in exercise of that power, appointed that *A.*, *B.*, and *C.* should stand possessed of the said two sums in trust to pay a legacy of £2000 (which lapsed) and other legacies amounting to £6100. She bequeathed to her husband £2000, which she authorized her executors to pay, and bequeathed to him her *H.* stock not included in the settlement. She directed that her funeral expenses be paid by her said trustees out of her said trust property, and that her legacies be paid free of duty. And as to all the residue of her personal estate whatsoever she bequeathed the same to her nephew, who died in her lifetime. She appointed *A.*, *B.*, and *D.* her executors. At the date of the will the value of the trust property was about £11,000, and she had no other property except the *H.* stock and some small savings of her separate estate:—*Held*, that the trust property was intended by the testatrix to be taken out of the settlement for all purposes, and that, having regard to sect. 27 of the *Wills Act*, the balance, after payment of all the legacies, duty, and expenses, became part of her personal estate and passed to her husband. *In re* Pinède's Settlement - - - - - - 667

2. —— *Special Power of Appointment—Exercise—General Words—Will—Construction.*] Under his marriage settlement a testator had a power of appointment by deed or will over personal estate among his children. He had no other power of appointment. By his will he devised and bequeathed all the real and personal estate of or to which he might be at the time of his death seised or entitled, or over which he might have "any beneficial power of disposition" (save such as were by his will otherwise devised or bequeathed), to trustees, upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses, debts, and legacies, and as to the residue of the proceeds, upon trust, as to one-third, for his eldest son; as to another third, for his younger sons in equal shares; and, as to the remaining third, upon trust for his daughters in equal shares, their shares to be settled for the benefit of themselves, their husbands, and children:—*Held*, that the power was not exercised by the will. Ames *v.* Cadogan - - - - - 868

—— To borrow—Company - - - 707
See Company. 1.

PRACTICE—*Adding to Accounts directed by Decree—Lapse of Time—Fraud—Rules of Court*, 1875, *Order* xxxiii.] In an action to administer the estate of a deceased solicitor, an administration decree, directing the usual accounts and inquiries, was made in April, 1867. In December, 1871, an order was made that, in addition to the accounts and inquiries directed by the decree, the ordinary accounts and inquiries should be taken and made of and relating to the partnership dealings and transactions between the testator and his former partners who consented to be bound. Before this order was made the partners had claimed to be creditors on the estate for a large amount, and had filed affidavits alleging that the testator had frudulently misappropriated moneys belonging to the partnership. In February, 1879, the then surviving partner applied by summons that an additional account might be taken of the amount in which the testator's estate was indebted to the applicant for partnership moneys fraudulently retained or improperly applied by the testator, and of the interest which ought to be allowed on taking the account:—*Held* (affirming the decision of *Fry*, J.), that the Court had jurisdiction to add the account asked for, and that under the circumstances it ought to be added; but the Court added a direction that the Chief Clerk should at the instance and at the risk, as to costs, of the Defendant certify any circumstances shewing that the surviving partner participated in the moneys fraudulently withdrawn or retained by the testator.—Whether, under the order for the ordinary accounts and inquiries relating to the partnership dealings and transactions, the question of fraudulent withdrawal of moneys and the claim for interest thereon might not have been raised, *quære*.—Observations on *Job* v. *Job* (6 Ch. D. 562) and *Mayer* v. *Murray* (8 Ch. D. 424). Barber *v.* Mackrell **C. A. 534**

2. —— *Admission — Pleading — Motion for Judgment — Rules of Court*, 1875, *Order* xix., *rr.* 17, 20, 22,; xl., *r.* 11.] Unless the allegations in a statement of claim are specifically denied the Plaintiff is entitled to move for judgment as upon an admission of fact in the pleadings. Rutter *v.* Tregent - - - - - 758

3. —— *Appeal—Interlocutory Order—Time for appealing—Extension of Time—Order on Summons in Administration Suit against an Execution Creditor—Rules of Court*, 1875, *Order* lviii., *r.* 15 *—Memorandum of the* 10*th of November*, 1875.] After an action had been brought for the administration of a testator's estate the executrix carried on the testator's trade with his assets, and incurred a trade debt for which the creditor brought an action and obtained judgment and execution, under which he seized some of the testator's assets. The sheriff interpleaded, and the proceeds of the sale were paid into Court in the administration action. The creditor took out a summons in the administration action claiming the proceeds of the sale, but his claim was refused:—*Held*, that the order, although finally determining the rights of the parties, was an interlocutory order under Rules of Court, 1875, Order lviii., rule 15, and that an appeal must be brought within twenty-one days. Enlargement of time refused.—The Memorandum as to Practice of the 10th of November, 1875 (1 Ch. D. 41), explained. Pheysey *v.* Pheysey - - **C. A. 305**

4. —— *Appeal—Motion for New Trial—Rejection of Evidence—Rules of Court*, 1875, *Order* xxxix., *r.* 1.] Where, on a trial in the Chancery Division, the Judge has not found a separate verdict on a question of fact, but has decided the case as a whole according to the old practice of the Court of Chancery, a motion for a new trial on the ground of improper rejection of evidence cannot be made, the remedy of the unsuccessful

PRACTICE—*continued.*

party being by appeal from the order, and the Court of Appeal having power at the hearing of the appeal to admit any evidence which may have been improperly rejected.—*Krehl* v. *Burrell* (10 Ch. D. 420) distinguished. DOLLMAN *v.* JONES [**C. A.** 553

5. —— *Appeal to the House of Lords—Staying Proceedings pending Appeal—Rules of Court,* 1875, *Order* LVIII., *r.* 16.] Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the Court will not interfere if the appeal appears not to be *bonâ fide*, or there are other sufficient exceptional circumstances. And when the Court makes an order to stay proceedings pending an appeal it will put the Appellants on terms to speed the appeal; and it will not interfere with the execution of the order of the Court below respecting costs, except to put the solicitor who is to receive the costs upon an undertaking to refund them if required to do so.—In a suit by a bondholder of a railway company on behalf of himself and other bondholders, against the company, claiming that the money advanced should be returned, instead of its being applied in the undertaking, judgment was given for the Plaintiff with costs, and it was ordered that the money should be forthwith distributed among the bondholders. The bonds were payable to bearer, and the bondholders were very numerous and many were residing abroad. On the other hand the Defendant company was insolvent, and it was very doubtful whether, if the undertaking was carried on, the shareholders would get any benefit from it.—The Defendants appealed, and moved to stay proceedings pending the appeal:—*Held* (*dissentiente James*, L.J.), that there were sufficient grounds to induce the Court to stay the distribution of the fund pending the appeal; and that the special circumstances of the company were not sufficient to prevent the Court from interfering. WILSON *v.* CHURCH (No. 2) - - - - **C. A.** 454

6. —— *Costs of Shorthand Notes.*] Where shorthand notes of evidence are essential to the proper hearing of the case, the costs of such notes will be allowed. LEE CONSERVANCY BOARD *v.* BUTTON - - - - - - 383

7. —— *Discovery—Answer to Interrogatories—Member of Company—Costs—Rules of Court,* 1875, *Order* XXXI., *rr.* 4, 6, 10.] A member of a company is entitled to refuse to file his affidavit in answer to interrogatories, delivered to him under rule 4 of Order XXXI. of the Rules of Court, 1875, until he has been paid his taxed costs of making it. BERKELEY *v.* STANDARD DISCOUNT COMPANY [295

8. —— *Dismissal of Bill—Injunction pending Appeal to House of Lords.*] A decree was made in three suits for the administration of the personal estate of an intestate, directing the usual inquiry as to her next of kin. A certificate was made finding five persons of the name of *F.*, who were resident abroad, to be the next of kin, and an order was made for distribution of the fund in Court among them. *S.*, who had not been a party to the proceedings, applied by motion to stay the distribution of the fund, alleging herself to be next of kin. The Vice-Chancellor suspended the giving out of the order, and directed his Chief Clerk to inquire whether *S.* had made out a *primâ facie* case, and the Chief Clerk finding that she had not, the Vice-Chancellor directed the order to be given out without prejudice to any independent proceeding by *S.* Four of the five shares were at once transferred to four of the persons found entitled; the fifth remained in Court. Two of the shares which had been transferred were sold out, and the proceeds received by the vendors. *S.* then commenced an action, and obtained in it an order granting an injunction to restrain any dealing with the three shares which had not been sold, and directing an inquiry who were the next of kin, and this order was subsequently directed to be taken as made in the three suits as well as in the action. The Chief Clerk again found the *F.* family to be the next of kin. The action and a summons to vary the certificate were heard before the Vice-Chancellor, who dismissed the summons and the action, but continued the injunction in the three causes until further order. *S.* appealed, and the Court of Appeal affirmed the decision of the Vice-Chancellor dismissing her bill, but *S.* being about to appeal to the House of Lords:—*Held*, that as, if *S.* ultimately succeeded in the House of Lords, her success would be useless unless the fund was protected in the meantime, the injunction ought to be continued pending the appeal. POLINI *v.* GRAY. STURLA *v.* FRECCIA **C. A.** 438

9. —— *District Registry—Payment of Money into Court.*] When an action is commenced in a District Registry and money is ordered to be paid by a receiver into Court to the credit of the action, it is not a compliance with that order to pay the money into a bank "to the credit of the District Registrar." That mode of payment is irregular, and the money will be ordered to be brought into Court under the *Chancery Funds Act and Rules.* FINLAY *v.* DAVIS - - - - 735

10. —— *Pleading — Reply — Striking out — Embarrassing Reply—New Claims—Facts by reference to Independent Document—Pleading Evidence—Pleading Arguments—Rules of Court,* 1875, *Order* XIX., *rr.* 17, 18, 20; *Order* XXVII., *r.* 1.] A reply must not refer to an independent document, such as Plaintiff's answer to interrogatories, as containing facts on which the pleader relies, without setting out such document itself as part of the reply.—A reply must not set up new claims.—A reply must not plead mere evidence, or argument, or state conclusions of law to be drawn or inferred from the facts pleaded.—Upon motion by a Defendant, the whole of a reply faulty in those respects was ordered to be struck out as embarrassing, although the notice of motion did not in terms ask to have the whole reply struck out, but only to have particular passages struck out, without specifying them otherwise than by reference to what was to be left in; and leave was given to the Plaintiff to put in such other reply as he might be advised.—Order XIX., rule 20, of Rules of Court, 1875, does not apply to a reply to an ordinary defence unaccompanied by a counter-claim; and where a Plaintiff is replying to an

PRACTICE—*continued.*

ordinary defence setting forth facts which it is merely desired to traverse, it is not necessary to traverse specifically such facts one by one.—It is competent for a Plaintiff to introduce new matter by way of set-off or by way of controverting the statements of the defence, provided that he do so within a reasonable compass and in a reasonable manner. Williamson *v.* London and North Western Railway Company - - **787**

11. —— *Preliminary Accounts—Rules of Court,* 1875, *Order* xv., *r.* 1—*Further Consideration.*] When an order for preliminary accounts is obtained under Rules of Court, 1875, Order xv., rule 1, after issuing the writ of summons in a foreclosure action, and after simple appearance to the writ by the Defendant, the order should not prejudice the trial of any issues which might be raised by the pleadings subsequently delivered by inserting as of common form the words "and the Judge not requiring any trial of this action other than this application." Gatti *v.* Webster **771**

12. —— *Receiver — Abatement of Action — Death of sole Defendant—Appointment of Interim Receiver—Rules of Court,* 1875, *Order* l., *r.* 1.] In a creditor's action for administration against an executrix, a decree had been made and a summons taken out for a receiver; but pending the summons the sole Defendant died. The Court, on the application of the Plaintiff, appointed an interim receiver, whose powers were to extend for ten days after the appointment of an administrator *de bonis non,* the Plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator and to accept short notice of motion to discharge the receiver. *In re* Parker. Cash *v.* Parker - - **293**

13. —— *Receiver—Appointment of Member of Firm of Plaintiff's Solicitors to be Receiver.*] *A.*, who was a member of a firm of solicitors, was appointed executor of a will, probate of which was contested. Immediately after the testator's death *A.* commenced against his widow an action in the Chancery Division to administer his estate, the writ in which was by leave of the Court amended by asking for a receiver pending the litigation in the Probate Division. *A.*'s firm appeared for both the Plaintiff and Defendant in the Chancery action, and an order was made appointing *A.* to be receiver of the personal estate until the decision of the Probate action, and also to receive the rents of the real estate, the only security ordered being the payment of £2000 into Court, though the rents were about £3500 per annum. The widow afterwards obtained an order to change her solicitors, and moved to discharge *A.* from being receiver. She denied having given the firm any authority to appear for her, and it was established, at all events, beyond doubt that she had never sanctioned the appointment of *A.* as receiver:—*Held,* by the Court of Appeal, that the appointment of *A.* as receiver was improper, for that the appointment of a member of the firm of the Plaintiff's solicitors to be receiver makes it impossible to secure the proper checking of the receiver's accounts, and that a party to the action ought not, except in an extreme case, to be appointed a receiver without the assent of the other party.—*A.* was accordingly discharged from being receiver and ordered to pay the costs both in the Appeal Court and in the Court below. *In re* Lloyd. Allen *v.* Lloyd - - **C. A. 447**

14. —— *Receiver—Application for Payment by Stranger to Action—Locus Standi—Jurisdiction.*] A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands.—*Neate* v. *Pink* (15 Sim. 450; 3 Mac. & G. 476) explained. Brocklebank *v.* East London Railway Company - - **839**

15. —— *Rehearing — Judicature Act,* 1873, *ss.* 16, 17, 18.] Under the system of procedure established by the Judicature Acts no Judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other Judge, the power to rehear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal. *In re* St. Nazaire Company - - - - **C. A. 88**

16. —— *Security for Past Costs—Plaintiff going out of Jurisdiction—Amount of Security.*] Under the *Judicature Act* when Plaintiff goes out of the jurisdiction security for costs as well past as future may be ordered to such amount as the Court may think fit, in accordance with the old Common Law practice. Massey *v.* Allen - - **807**

17. —— *Service out of Jurisdiction—Rules of Court,* 1875, *Order* xi., *rr.* 1, 1*a.*] A charterparty having been entered into in *Scotland* between the Plaintiffs and a shipowner, both parties being resident in *Scotland,*—on an *ex parte* motion to restrain the shipowner from dealing with the ship, which was then at a port within the jurisdiction, in a manner alleged to be inconsistent with the charterparty:—*Held,* having regard to the discretion given to the Court by Rules of Court, 1875, Order xi., rule 1a, that it was not a case in which the Court would grant an injunction or direct service of the writ out of the jurisdiction. *Ex parte* McPhail - - - - - **632**

18. —— *Service out of the Jurisdiction—Rules of Court,* 1875, *Order* ii., *r.* 4; *Order* xi., *rr.* 1, 1a, 3 — *Residence in Ireland.*] The Plaintiff (who resided in *Ireland*) and the Defendant entered into a partnership contract executed in *London* (the Defendant being described as a civil engineer of *Victoria Street, Westminster*) for the construction of a railway in *Ireland.* The Defendant and his family went to reside in *Ireland,* he having to superintend the works in progress. The contract provided that the business should be carried on in *Victoria Street* and *Ireland,* and that the books should be kept at *Victoria Street.* After a very short time this clause was abandoned and the business and the books were carried on and kept in *Ireland.* Disputes having arisen, the Plaintiff, while residing for a short time in *England,* obtained leave from the Chief Clerk, upon an *ex parte* application in Chambers, to issue and serve out of the jurisdiction a writ in an action for the taking of the accounts and for the appointment of a receiver and manager:—*Held,* under Rules of Court, 1875, Order xi., rules 1 and 1a, that the application of the Plaintiff was improper, and that

PRACTICE—*continued.*

the writ must be discharged with costs. TOTTENHAM *v.* BARRY - - - - - 797

19. —— *Trial by Jury—Rules of Court*, 1875, *Order* XXXVI., *rr.* 3, 26.] Upon motion by the Defendant under Rules of Court, 1875, Order XXXVI., rule 3, that certain specified issues of fact might be tried before a Judge or jury in the country:—*Held*, that it was obligatory on the Court to order the trial subject to the discretion given by rule 26; and it not appearing to the Court desirable to direct a trial without a jury, the motion was acceded to, the issues to be settled in Chambers:—*Held*, also, that the Defendant should have given notice out of Court without moving for an order; and should have required the issues of fact to be tried without specifying any particular issues; and in consequence of these irregularities no costs were allowed to the Defendant. POWELL *v.* WILLIAMS - - - - - 234

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PUBLIC HEALTH ACT—*Sewers—Local Boards—Communications*—38 & 39 *Vict. c.* 55, *s.* 22—*Act of Parliament—Repeal of Covenant.*] By an agreement between the *N.* Local Board and the *C.* Local Board, it was agreed that the *N.* Board should make a sewer and allow the sewers of the *C.* district to drain into it, but the sewage of any other districts or places was not to be permitted by the *C.* Board to pass into their sewers so as to discharge into the sewer to be made by the *N.* Board. Under Acts of Parliament then in existence, the owner of premises beyond the limits of a district has power to make a sewer to communicate with the sewers of the district, and by an Act subsequently passed similar powers were given:—*Held*, that the provisions of the agreement were overruled by the subsequent Act, and that the *N.* Board could not restrain the *C.* Board and the owners of premises beyond their district from making sewers which would discharge into the sewer of the *N.* district:—*Held*, also, that the agreement must be taken to have been made subject to the provisions of the law then existing, under which the owners of premises beyond the *C.* district had similar powers. NEWINGTON LOCAL BOARD *v.* COTTINGHAM LOCAL BOARD - 725

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RAILWAY — *Statutory Powers — Diversion of Private River—Necessity for Construction of Railway—Railways Clauses Consolidation Act*, 1845, *s.* 16.] A railway company is not authorized by sect. 16 of the *Railways Clauses Act*, 1845, permanently to divert the course of a private river, unless the diversion is necessary for the construction of the railway. The diversion cannot be made merely because it will diminish the expense of the construction of the railway.—*Reg.* v. *Wycombe Railway Company* (Law Rep. 2 Q. B. 310) followed.—*Attorney-General* v. *Ely, Haddenham, and Sutton Railway Company* (Law Rep. 4 Ch. 194) distinguished. PUGH *v.* GOLDEN VALLEY RAILWAY COMPANY - - - - 274

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—— Paid-up - - - - 511, 850
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SHERIFF—*Return to Writ of Fi. Fa., Neglect to make—Costs against Sheriff.*] Where a sheriff had failed to make any return to a writ of *fi fa.*, notwithstanding an order of course directing him to make his return forthwith, he was, upon an application *ex parte* against him for an order *nisi*, directed, upon the authority of *Evans* v. *Davies* (7 Beav. 81), to pay both the costs of the order *nisi* and of the previous order of course. *In re* Heiron's Estate. Hall *v.* Ley - - 795

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See Will. 2.

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SHIP—*Charterparty — Termination of Voyage—Place of Discharge named which is not in a Public Port—Obligation to provide Place of Discharge—Custom of Timber Trade.*] By a charterparty made between the Plaintiffs, who were shipowners, and the Defendant, who was a *London* merchant, it was stipulated that the steamer *E.*, belonging to the Plaintiffs, should proceed to a port on the *Baltic*, load a cargo of deal timber, and proceed to *London, S. C. Docks*, or as near thereunto as she might safely get, and deliver the same on being paid freight at a rate therein specified: the cargo to be received at port of discharge as fast as steamer could deliver as above; ten days to be allowed on demurrage over and above the laying days at £30 per day. The *S. C. Docks* are private docks adjoining the port of *London*, and the Defendant applied to the owners of the docks for a berth for unloading the ship, but was unable to obtain a berth in consequence of the crowded state of the docks. The Plaintiffs brought the ship to *London* on the 4th of August, and applied at the dock gates for admission but were refused, and accordingly moored the ship at the nearest safe place. The Defendant made no other arrangement for unloading the ship, and the Plaintiffs ultimately themselves unloaded the ship by lighters into the *S. C. Docks:* the unloading being completed on the 31st of August.—The Plaintiffs alleged that it was the custom in the *Baltic* timber trade in the port of *London* for the importers of timber to provide berths for the discharge of the cargo, and the Defendant having failed in doing so they claimed demurrage and damages for the detention of the ship:—*Held*, by *Jessel*, M.R., that the alleged custom was not proved, and that, the obligation to provide a berth lying upon the Plaintiffs no less than on the Defendant, the action could not be sustained.—But *held*, by the Court of Appeal, that, the ship having been prevented from entering the *S. C. Docks* by a permanent obstacle, and the Plaintiffs having brought the ship as near as she could safely get, the Plaintiffs were entitled to demurrage and damages for detention.—The provision in a charterparty that a ship is to be brought to a particular place, "or as near thereto as she may safely get," refers to the ship being prevented from getting to her primary destination by any permanent obstacle other than an accident of navigation; not merely by an obstacle endangering her safety.—Discussion of the rights of shipowners and charterers as to unloading and demurrage under charterparties not containing the provision for an alternative place of discharge.—NELSON *v.* DAHL **C. A. 568**

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SOLICITOR—*Lien—Charging Order—Form of Application—Petition or Summons—Persons to be served—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 39.] An application by a solicitor, under s. 28 of the *Solicitors Act* of 1860, for an order charging his costs upon the interest of a party to an action in a fund in Court, is notwithstanding s. 39 of the *Judicature Act*, 1873, properly made by a petition in the action.—But the other parties to the action ought not to be served with the petition. BROWN *v.* TROTMAN - - - - 880

SOLICITOR—*continued.*

2. —— *Lien—Clerk to Local Board—Production of Documents—Order on Interlocutory Application.*] Where a solicitor had been appointed clerk to a local board, with a salary, for conducting the legal as well as the ordinary business of the board, it was *held* by *Bacon*, V.C., upon an interlocutory motion in an action for mandamus to compel production of papers, that, whatever claim the clerk might have against the board for payment of costs in respect of professional services, he had no right, being in the relation of servant to the board, to refuse production of the legal papers or other documents claimed by the board as belonging to them:—But *held*, by the Court of Appeal, that as such an order would prejudice the clerk's lien, it could not be made before the trial of the action without payment into Court of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers; and the Court ordered that upon that being done the clerk should deliver up to the Plaintiffs all books and papers claimed in the action. NEWINGTON LOCAL BOARD *v.* ELDRIDGE - - - - **C. A. 349**

3. —— *Lien — Country Solicitor and Town Agent—General and Particular Lien.*] A *London* solicitor acting as agent for a country solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business and disbursements due from the country solicitor, whether in the particular action or in any other proceedings; but as between the town agent and the client, the lien of the former extends only to the costs of the particular action in which he is engaged. LAWRENCE *v.* FLETCHER - - - - - 858

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TENANT IN COMMON—*Farming Business—Purchase by Brothers of One-third Share—Conveyance to Purchasers as Joint Tenants — Partnership Dealings and Assets.*] Three brothers, tenants in common of a farm and lands in *Wales*, carried on a farming business together. One brother died, having devised his one-third share to a nephew, and he and the two surviving brothers, *B.* and *W.*, continued to carry on the farming business. The nephew sold his one-third share of the farm and lands to his uncles *B.* and *W.*, the conveyance being to them as joint tenants, and they

TENANT IN COMMON—*continued.*
continued to carry on the farming business. *B.* died, having given all his property to his wife. The farm and lands were subsequently sold. *W.* claimed, as surviving joint tenant, the proceeds of sale, representing the one-third share purchased from the nephew:—*Held*, that the one-third share became involved in partnership dealings, and must be regarded as partnership property, and that *W.* was entitled to only a moiety of the proceeds of sale. DAVIES *v.* GAMES - - 813

TENANT IN TAIL—Lunatic—Power of Court to bar entail - - - - 333
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TOWING-PATH — *Lee Navigation* — *Rights of adjacent Owners—Form of Defence.*] In an action by the Plaintiffs, who were conservators of the River *Lee* Navigation, to restrain the Defendant, who was the owner of property adjoining the towing-path, from using such towing-path for the passage of horses and carts and the carriage of goods and merchandise:—*Held*, that, by various Acts of Parliament under which the River *Lee* was constructed and preserved, the Plaintiffs did not acquire the freehold of the land forming the towing-path, which remained in the original owners, nor any easement over it; but only the right and the duty to keep it in a fit state for the public to use as a towing-path. But *held*, that by reason of this right and duty the Plaintiffs were entitled to an injunction to restrain the Defendant from so using the towing-path as to interfere with its use by the public for the purposes of the navigation. — The judgment of *Malins*, V.C., varied.—*Per Malins*, V.C.: A Defendant ought not to deny by his statement of defence plain and acknowledged facts, which it is neither to his interest nor in his power to disprove. LEE CONSERVANCY BOARD *v.* BUTTON - - C. A. 383

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TRUSTEE—*Bankruptcy of Trustee—Removal from Trusteeship—Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71), s. 117.] Where a trustee having, either solely or jointly with others, control over the trust property has recently become bankrupt, and it is not shewn that he has since become possessed of means, the Court will, as a general rule, order his removal on the petition of the *cestuis que trust*, under sect. 117 of the *Bankruptcy Act*, 1869. *In re* ADAMS' TRUST - - - - 634

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—— Trustee Relief Act—Banker - - 175
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TRUSTEE IN BANKRUPTCY — Disclaimer of shares in company - - 288
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See BANKRUPTCY. 1.

TRUSTEE RELIEF ACT — *Bankers—Moneys on Deposit—Conflicting Claims—Payment into Court —Judicature Act*, 1873, s. 25, *sub-s.* 6—*Costs.*] A banking company having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into Court under the *Trustee Relief Act*, after first deducting therefrom their costs of payment in.—Upon petition by one of the claimants for payment out:—*Held*, that the proviso in sect. 25, sub-sect. 6, of the *Judicature Act* only applied to debts of which there had been an absolute assignment in writing; and that the banking company, not being trustees within the *Trustee Relief Act*, were not entitled to pay the deposit moneys into Court thereunder:—But *held*, that the Petitioner must be taken to have submitted to the jurisdiction under the *Trustee Relief Act* by petitioning the Court, and, upon the principle of *In re Haycock's Policy* (1 Ch. D. 611), the bank were entitled to their taxed costs of payment in and of the petition, and such costs were directed to be taxed accordingly. *In re* SUTTON'S TRUSTS - - - - 175

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VENDOR AND PURCHASER—*Conditions of Sale —Misleading Condition—Sale by Court — Conveyancing Counsel of Court—Form of Order when Condition held misleading.*] A condition of sale

VENDOR AND PURCHASER—*continued.*

is bad as misleading, 1, if it requires the purchaser to assume what the vendor knows to be false; 2, if it states that the state of the title is not accurately known when in fact it is known to the vendor.—At a sale of the fee simple of a farm under the order of the Court there was a condition that a declaration by the tenant should be produced to the purchaser that the farm was taken by him from *E.* in October, 1835, and had since been held by him of her and those claiming under her in succession. The condition provided that the purchaser should be satisfied with the title so made, without the production of any document previous to the will of *E.* in 1860, who should be assumed to have been seised of the property in fee simple in possession, free from incumbrances, in October, 1835, and up to and at her death. The condition further stated that it was not accurately known, and could not be satisfactorily explained, how she acquired the property, and it was expressly stipulated that no other title than as above should be required or inquired into.—The purchaser, after an abstract of title in accordance with the condition had been furnished to him, discovered that *E.* was a mortgagee in possession and had no title against the mortgagor except under the *Statute of Limitations* by adverse possession commencing in 1844; and that her executor in 1861 had paid legacy duty on the mortgage debt, and not succession duty on the estate. These facts were well known to the vendor:—*Held* (reversing the decision of *Fry*, J., on fresh evidence), that the condition of sale was a misleading condition, and that the purchaser was entitled to have a good holding title notwithstanding the condition, or else to rescind his contract.—The conveyancing counsel of the Court must be treated as the agent of the vendor as between the vendor and the purchaser.—Where the conditions on the face of them purport to give only a good holding title, the purchaser on being relieved from them is not entitled to have more than a good holding title. *In re* Banister. Broad *v.* Munton - - - C. A. 131

2. —— *Conditions of Sale—Superfluous Land of Railway Company—Option of Prior Owners—Lands Clauses Act*, 1845, *s.* 128—*Condition that Purchaser shall admit a Defective Title—Forfeiture of Deposit.*] A contract for sale of superfluous land of a railway company which had been conveyed by the company to the vendor contained a stipulation that the purchaser should assume and admit that everything (if anything was necessary) was done by the company to enable them to sell the land as surplus land, and should not call for or require production of any evidence to that effect; and a further stipulation that if the purchasers should fail to comply with the terms of the agreement the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; and as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit and damages. The vendor then sold the land to one of the prior owners:—*Held* (reversing the decision of *Hall*, V.C.), that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor; and that as he had refused to abide by that stipulation he had broken the contract, and could not maintain the action, or claim a return of his deposit. Best *v.* Hamand C. A. 1

3. —— *Specific Performance—Decree against Purchaser in Default—Order to rescind Agreement—Claim for Damages—Form of Order.*] After a decree for specific performance of an agreement against a purchaser who was unable to complete,—on a motion by the Plaintiffs that the agreement might be rescinded, and all further proceedings in the action stayed except as to any application which might be made to the Court to award and assess the damages which the Plaintiffs had sustained by the breach of the agreement:—*Held*, that the Plaintiffs were only entitled to have the agreement rescinded, and could not at the same time claim damages for its breach.—The form of order in *Foligno* v. *Martin* (16 Beav. 586), *Sweet* v. *Meredith* (4 Giff. 207), and *Watson* v. *Cox* (Law Rep. 15 Eq. 219) not followed. Henty *v.* Schröder - - - - - 666

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See Will. 13.

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See Company. 22.

WILL—*Construction—Exclusion of Persons who were Next of Kin—Intestacy as to Residue.*] Testator, after stating that it was his will that neither *L. S.* nor her children should take any benefit from his property other than what was given to her or them; and that it was not his intention that *G. S.*, or any person claiming under him, should partake of any share in the distribution of his personal estate except what was given to him or them, said he considered that the provision which he had made for his brother and two sisters was adequate for their support, and therefore it was his intention that they should not, nor should any of them, take any benefit from his property except what was given for them; and he declared that *L. S.*, *G. S.*, and his brother and two sisters, should not be entitled to take any share of his personal estate of which he might happen to die intestate, but should be wholly excluded therefrom in the same manner as if they had all died in his lifetime. There was an intestacy as to residue:—*Held*, that the next of kin other than the five persons named who were excluded were entitled. Bund *v.* Green - - 819

2. —— *Construction—Forfeiture—Bankruptcy or Alienation—Practice—Insolvent Testator—Two Actions relating to Estate—Creditors' Administration Action—Executrix-Legatee—Conflicting Interests—Order for Plaintiff to "intervene" in Second Action—Irregularity—Creditor appearing in Name of Executrix.*] Where a testator makes a bequest coupled with a clause of forfeiture on bankruptcy or alienation, the Court considers it to be his manifest intention that the bequest shall enure to the personal enjoyment and benefit of the legatee; and will therefore construe the clause, if ambiguous in its terms, in such a way as to effect

WILL—*continued.*

that intention:—*Semble*, where there is a bequest to *A.* for life, with remainder to *B.* absolutely, followed by a clause of forfeiture of *B's* interest in the event of his bankruptcy or alienation, and *B.* charges or mortgages his interest in the lifetime of the tenant for life, to prevent a forfeiture the charge must have been vacated or the incumbrance destroyed before the period of distribution, that is, the death of the tenant for life, and not merely before the time for *B.'s* first receipt of money under the bequest.—*White* v. *Chitty* (Law Rep. 1 Eq. 372) questioned.—A testator bequeathed his residuary estate to his wife for life, and after her death to his son absolutely, "if at the decease of my said wife he shall not be or have been declared bankrupt, or have taken the benefit of any Act or Acts for the relief of insolvent debtors, or have committed or done any other act, matter or thing which would make such ultimate surplus payable or transferable to or vested in or chargeable for the benefit of any other person or persons in case such surplus had been given to him absolutely and without any condition or contingency: but if he shall at any time before the decease of my said wife have been declared bankrupt or taken the benefit of any Act or Acts of Parliament for the relief of insolvent debtors, or shall have committed or done any such other act, matter or thing, then" upon trust for the son's wife for her life and after her death for her children.—The testator died leaving his widow, the tenant for life, surviving. By three deeds executed in the widow's lifetime the son mortgaged his interest under the will, "subject to the said proviso or condition in the said will." All three mortgages were satisfied by the son in the widow's lifetime. On the discharge of the first two mortgages reassignments were executed, but on the discharge of the third mortgage the son took no reassignment, the mortgage deed being simply handed back to him with the seals and attestation clause cut off. The son then died insolvent, whereupon an action was brought by his only child against his widow and executrix to have it declared that the execution of the mortgages operated as a forfeiture of the son's interest:—*Held*, that no forfeiture had taken place.—Upon the son's death an action of *Bennett* v. *Samuel* was instituted by a creditor in another branch of the Court for the administration of his estate. In that action an order was made giving the Plaintiff leave to apply in the present action (*Samuel* v. *Samuel*) to "intervene therein by appearing at the trial and contending that there was no forfeiture of the son's interest." Upon production of this order the Chief Clerk to the Master of the Rolls made an order giving the Plaintiff in *Bennett* v. *Samuel* leave to "intervene" in *Samuel* v. *Samuel* accordingly, whereupon that Plaintiff appeared at the trial of *Samuel* v. *Samuel* to contend against the forfeiture:—*Held*, that, although, under the circumstances, that Plaintiff was entitled to his costs of appearance, both orders were irregular, and that the proper course was for him to have obtained an order in *Bennett* v. *Samuel* for leave to appear in *Samuel* v. *Samuel* in the name of the son's widow, her interest as his executrix being in conflict with her beneficial interest under his father's will. SAMUEL *v.* SAMUEL - - - - - 152

WILL—*continued.*

3. —— *Construction—Gift of Leaseholds upon Trusts to correspond with Uses of Freeholds—Shifting Clause—Remoteness—Executory Trust.*] A testator devised his freehold estates in *Worcestershire* to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised his freehold estates in *Cardiganshire* to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his *Worcestershire* estates, and if his fifth son or any of his issue male should be then living, the limitations of his *Cardiganshire* estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in *Cardiganshire* to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the *Cardiganshire* freeholds.—The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the *Worcestershire* estates:—*Held*, that the fifth son was entitled to the rents and profits of the *Cardiganshire* leaseholds, because they were given upon an executory trust; and, assuming the shifting clause, if applied verbatim to the leaseholds, to be bad from remoteness, it ought to be so modified as to render it free from that objection:—*Held*, also, that the shifting clause was divisible, and in the events which happened was not bad for remoteness. MILES *v.* HARFORD - - - - - - 691

4. —— *Construction — Gifts to Son and Daughters for Life and to their Children—"Die without leaving issue"—"Their surviving child or children"—Children of Deceased Children entitled.*] Testator gave the residue of his real and personal estate to trustees in trust, after paying the income unto his wife for life, for his son and five daughters during their respective lives, equally to be divided between them as tenants in common (except that his eldest daughter should have a double share), the share of each daughter to be for her separate use; and after the respective decease of each of his children the share or shares to which he, she, or they might be entitled of and in his estate should be in trust for his, her, or their child or children equally, to be a vested interest at twenty-one years of age; and there was a proviso that if any or either of his children should die without leaving issue him or her surviving who should live to attain the age of twenty-one years, the share or shares to which any or either of his children should be entitled of and in his estate should thereupon be held in trust for his then surviving child or children in such manner and form in all respects as declared with regard to the share or shares originally given to him, her, or them. Power was given by the testator, after the death of his wife, for the major part in number of his then surviving children by any writing to appoint new trustees or a new trustee.—The son and daughters survived the testator:—*Held*, that of the shares of two daughters who died subsequently to the son, without leaving

WILL—*continued.*

children, the children of the son were entitled to one-third. *In re* WALKER'S ESTATE. CHURCH *v.* TYACKE - - - - - - 205

5. —— *Construction—Limitations in Strict Settlement—"Eldest Son."*] Except in cases of portions or of a specially qualifying context, "eldest son" means "first-born son."—A testator, by will dated in 1841, devised lands to the use of *A.* for life, with remainder to the use of "the eldest son" of *A.* for life, with remainder, after the decease of the eldest son of *A.*, to the use of the eldest son of his body and his heirs for ever; but in case of the death of the eldest son of *A.* without issue male, to the use of the second, third, fourth, and every other son of *A.* successively in tail male; and the will contained a proviso that the first, second, third, and every other son of *A.* should, before receiving the rents of the lands. take and use the name and arms of the testator. The first-born son of *A.* was living at the date of the will, but died an infant. *C.*, the second-born son of *A.*, was his eldest living son at the time of the death of the testator:—*Held*, that the word "eldest" must be construed as "first-born," and that, subject to his father's life estate, *C.* was tenant in tail under the will:—*Held*, also, that the eldest son of *A.* took by implication an estate tail in remainder after the estate tail of his eldest son. MEREDITH *v.* TREFFRY - - 170

6. —— *Construction—Mistake—Erroneous Recital—Advance—Account.*] A testator, by his will, gave a legacy, and by a codicil, after reciting that he had advanced to the legatee a certain sum, he directed that sum to be considered as a payment on account of the legacy:—*Held*, that the sum mentioned would be deducted from the legacy, though the advance in fact made was less than that sum. *In re* AIRD'S ESTATE. AIRD *v.* QUICK [291

7. —— *Construction—Property acquired after Date of Will—Contrary Intention—Wills Act* (1 *Vict. c.* 26), *s.* 24—*Bequest of Annuity pur autre Vie—Duration of Annuitant's Interest—Death of Annuitant before Cestui que Vie.*] A testator gave, after the decease or second marriage of his wife, all his leaseholds situate at *C.* to his son absolutely, charged nevertheless with the payment of all mortgage debts charged thereon, and "also with the payment of the annuity of £9 now charged thereon in favour of my sister."—The testator at the date of his will was possessed of two leasehold properties at *C.*, one subject to a mortgage, and the other subject to the annuity of £9. He acquired another leasehold property at *C.* between the date of his will and the date of his death:—*Held* (affirming the decision of *Hall*, V.C.), that the after-acquired leasehold property passed under the gift to the son.—The testator also bequeathed to his son an annuity of £40 from the period of his majority to the death or second marriage of the testator's wife. The son attained twenty-one, and died before the widow:—*Held* (affirming the decision of the Vice-Chancellor), that the legal personal representative of the son was entitled to the annuity until the death or second marriage of the widow. *In re* ORD. DICKINSON *v.* DICKINSON - - C. A. 22

8. —— *Construction—Real Estate—Clear Gift followed by ambiguous Expression—Words—Leaving Issue.*] Testator devised real estate to his granddaughter absolutely, and "after her decease without leaving any issue," over.—The granddaughter married and had a child;—*Held*, that upon the birth of a child the granddaughter's interest became indefeasible. WHITE *v.* HIGHT [751

9. —— *Construction—Real Estate—Charge of Debts—Direction that Executors shall pay Debts—Devise to Executors.*] When a testator directs that his debts shall be paid by his executors, and also devises real estate to them, either beneficially or on trust, it is a question of intention to be collected from the whole will whether the estate so devised is charged with the payment of the debts.—*Warren* v. *Davies* (2 My. & K. 49) explained. *In re* BAILEY. BAILEY *v.* BAILEY 268

10. —— *Construction—Real Estate—Charge of Legacies—Devise of Specific Realty, and of Residuary Realty and Personalty in one Gift—Failure of Residue—Legacies held charged on the Specific Realty.*] Testator directed that all his debts and funeral and testamentary expenses (not mentioning legacies) should be paid out of his personal estate. He then gave a number of legacies, and directed that if one of the legacies should fail, it should fall into his "residuary estate." He then devised all his freehold and leasehold hereditaments in the parishes of *B.*, *L.*, and *R.*, "and all the rest, residue, and remainder of" his real and personal estate, to trustees, upon trust to make a weekly payment to his wife during her life, and subject thereto to invest the residue, and after his wife's decease, as to all his freeholds, and all his leaseholds, and all the residue and remainder of his estate and effects, to stand possessed thereof upon certain trusts.—The personal estate, and the real estate other than the real estate in the parishes of *B.*, *L.*, and *R.*, were insufficient to pay the legacies:—*Held*, that the case was within the rule of *Greville* v. *Browne* (7 H. L. C. 689), and that the legacies were a charge on the real estate in the parishes of *B.*, *L.*, and *R.*—*Castle* v. *Gillett* (Law Rep. 16 Eq. 530) not followed. BRAY *v.* STEVENS - - - - - - 162

11. —— *Construction—Specific Bequest—Gift of "Two Houses in King Street" by Owner of Three Houses—Election.*] Testator, who was possessed of three leasehold houses in *K. Street*, bequeathed "two houses in *K. Street*" in trust for *P.* for life, and then to form part of his residuary gift. The will contained no other references to the testator's houses in *K. Street*:—*Held*, that two of the houses passed under the gift, and that *P.* was entitled to elect which he would take. TAPLEY *v.* EAGLETON - - - - 683

12. —— *Construction—Uncertainty—Gift over on Death of Legatee "before he shall have actually received his Share whether the same shall have become payable or not."*] Bequest of share of residue to *K.* and *G.*, "but in case *K.* shall die before he shall have actually received the whole of his share and without leaving issue living at his decease, then and in such case, and whether the same shall have become due and payable or not, such part or parts as he shall not have actually received to be paid to *G.*" *K.* died unmarried,

WILL—*continued.*
without having received any share of the residue:—*Held*, that the gift over was not void for uncertainty, but took effect.—*Martin* v. *Martin* (Law Rep. 2 Eq. 404) disapproved.—*Minors* v. *Battison* (1 App. Cas. 428) commented on. Johnson *v.* Crook - - - - - - 639

13. —— *Construction—Vesting—Gift over in case Legatee should die "before me or before the Division of my Estate."*] A testator gave his real estate and the residue of his personal estate to trustees, upon trust with all convenient speed after his death to sell and convert the same, and to hold the proceeds on trust to pay his debts and funeral and testamentary expenses, and, subject thereto and to the payment of an annuity, to divide the residue of the trust moneys into six equal parts, among two nephews and four nieces of the testator named in the will. He directed that the shares of the nephews should be paid to them as soon after his death as possible. He directed that the trustees should invest the shares of the nieces and pay the income thereof to them for their separate use. He directed that, in case any of his nephews should die before him, or before the division of his estate as before directed, his share should go over. And there was a similar direction with regard to the share of any of the nieces who should die before him, or before the division of his estate as before directed:—*Held*, that the "division" of the testator's estate meant the expiration of twelve months from his death, and that the share of one of the nieces, who survived him but died within that period, went over. *In re* Collison. Collison *v.* Barber - - - - - 834

—— Charitable legacy - - - 211
See Charity.

—— Power of appointment - - 667, 868
See Power. 1, 2.

WINDING-UP.
See Company. 6—23.

WORDS—"Actually received" - - 639
See Will. 12.

—— "Before the division of my estate" - 834
See Will. 13.

—— "Die without leaving issue" - 205, 751
See Will. 4, 8.

—— "Dividends" - - - - 655
See Apportionment.

—— "Due cause shewn" - - - 325
See Company. 22.

—— "Eldest son" - - - - 170
See Will. 5.

—— "Periodical payments" - - 655
See Apportionment.

—— "Person aggrieved" - - - 308
See Bankruptcy. 11.

—— "Surviving child or children" - 205
See Will. 4.

—— "Trading in a public company" - 655
See Apportionment.

WRIT—*Fi. fa.*—Neglect to return - - 795
See Sheriff.

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